University of Alberta

Nozick's Non-Libertarianism: A Philosophical Reconstruction

by

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Abstract

This thesis critically examines Robert Nozick's critique of patterned or end-state conceptions of justice, with its corollary critique of redistributive taxation and welfare programs, as presented in *Anarchy, State and Utopia* (hereinafter ASU). In opposition to libertarians in general, and Nozick in particular, this essay argues that a commitment to a right to liberty and property does not preclude, in and of itself, the acceptance of patterned theories and redistribution through taxation and welfare programs. Indeed, the project essentially attempts to show that Nozick's libertarianism itself requires, and is undergirded by, a commitment to welfare programs through redistributive taxation. More specifically, the essay contends that in accepting the Lockean proviso, with its concomitant egalitarian premises into his theory, and in making the plausibility of his argument rest on the proviso, Nozick has already infected his own libertarian views with just the same sort of redistributivism and welfarism he vehemently impugns. Furthermore, the paper contends that in cloaking his core ideas in the philosophies of Kant and Locke, Nozick, arguably, cannot argue against redistributive taxation without undermining the fundamental building block of his libertarianism. Consequently, the thesis concludes that Nozick's contention against redistribution via taxation and welfare programs is ultimately self-refuting, if not hypocritical. Although the paper has specific reference of *Anarchy, State and Utopia*, it also tries to contextualize ASU to Nozick's later work, including his *Invariances* (2001). My reason for situating ASU to Nozick's post-ASU writings is to demonstrate that what seems to be an *explicit* endorsement of patterned theories and redistributive

taxation in some of his later writings is rather made *implicit* in ASU. Thus, I shall contend that, notwithstanding the apparent anti-redistributivist emphasis of Nozick's argument in ASU, and notwithstanding his recent protestations of fidelity to libertarianism in *Invariances* and in an interview just before his untimely death, he has been a consistent non-libertarian, if not an anti-libertarian, all the way through in his oeuvre.

Dedication

To:

My Parents
(Sampson Manu & Mary Manu)

And

My Sweetheart
(Cecilia Boaheng)

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Introduction

The Problem

It has become customary for political philosophers who profess allegiance to libertarianism to pay homage to Nozick as the chief contemporary provenance of their inspiration. His book, ASU, is virtually regarded as the definitive defense of libertarianism.[1] To be sure, philosophers and non-philosophers alike who abhor taxation and welfare programs routinely invoke the authority of Nozick to justify their position. Supporters of welfare programs have taken pains to rescue the patterned conceptions of justice from attempts to discredit them by trying to undermine the force of Nozick's anti-patterned arguments in ASU. In short, the claim that Nozick's argument in ASU is incompatible with patterned theories, redistributive taxation and welfare states seems to have taken on the status of holy writ. Indeed, the bulk of ASU is devoted to contending that patterned theories or welfare programs are unacceptable and objectionable because they require meddling in consensual economic interactions and thereby involve the violation of people's rights to liberty and property. Accordingly, Nozick admonishes us to jettison patterned or end-state conceptions of justice in favor of his non-patterned historical theory of justice or the entitlement theory, as he prefers to call it. He thinks his entitlement theory is the only theory which treats the rights of individuals, at least under normal circumstances, as sacrosanct or inviolable. Although Nozick recommends and, indeed, encourages moral action, he insists that moral obligations that go beyond negative duties do not give birth to juridicial rights[2]. Nozick goes as far as to say that even dire human need, such as rights to life, cannot override (property) rights (ASU, 179).

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[1] I should note at this point my awareness that some libertarians might not consider Nozick as one of the "hard core" libertarians. Indeed, Nozick's relationship to 'mainstream' libertarianism seems ambivalent. On the one hand, he proudly describes himself as a libertarian. On the other hand, he seems to dissociate himself from unmitigated libertarians. For example, in his acknowledgments, among other things, Nozick has this to say: "It was a long conversation about six years ago with Murray Rothbard that stimulated my interest in individualist anarchist theory' (ASU, XV). Seen from this perspective, it is not unreasonable to think of ASU, Part One, as a response to Rothbard's position. The difference between the two writers is that whereas Nozick thinks some form of state is necessary – if only a 'minimal' state - Rothbard is completely opposed to any form of state. This being so, out of the two, it is Rothbard who is the purer libertarian. Indeed, since Nozick does *not* argue for the complete abolition of government or state, Rothbard and other libertarian fundamentalists may regard Nozick as heretical. That said, I argue that since Rothbard, like other individual anarchists, emphasize the importance of rights, and since a (minimal?) state is needed to safeguard our rights, his position is inherently contradictory. In short, as I will argue shortly, Rothbard's 'purer' libertarianism can be said to be inconsistent with the tenets of libertarianism. Also, it should be stressed that even if Nozick is not considered as one of the 'mainstream' libertarians, it cannot be denied that almost, if not all, non-libertarian academics continue to associate libertarianism with Nozick. Nor can it be denied that libertarians endlessly quote ASU to support their arguments. Indeed, the fact that some libertarians (e.g., Edward Feser, 2003) continue to devote their writings to defending Nozick's brand of libertarianism seems to enhance Nozick's status as a great libertarian.

Nozick's libertarianism has generated criticisms and consternation among his critics, mainly on the grounds that his non-patterned historical account of justice is inimical to human welfare. Most, if not all, of the criticisms that have assailed his "non-patterned" libertarianism have focused on his theory's insensitivity to the plight of the poor. To be sure, some commentators have gone so far as to suggest that the conclusions of ASU are so obnoxious and callous that they should not be taken seriously as political philosophy at all (Hodson 1977, Cohen 1995, Barry 1975). Although Nozick himself expects that "many persons will reject [his] conclusions instantly, knowing they don't *want* to believe anything so apparently callous towards the needs and suffering of others" (ASU: ix) he is convinced that the "callous" anti-patterned libertarian conclusions reached are ones that we, on pain of inconsistency, are logically compelled to accept. In other words, while Nozick prides himself on the coherence of his system, he concurs with his detractors that the anti-patterned conclusions that his work reaches are insensitive to the plight of the indigent. Thus, in the debate between Nozick and his non-libertarian opponents, it is commonly taken for granted that Nozick's libertarianism is antithetical to patterned theories and welfare programs.[3]

Among other things, this thesis provides a reassessment of the debate between libertarians, as represented by the views of Nozick, and "welfarist" non-libertarians, including John Rawls, that takes it to a new level of sophistication. It argues that, in ASU, Nozick surreptitiously preserves a notion of what one might call teleological distributivism that bears recognizable traces of non-libertarian conception of patterns and that his analyses of the Lockean proviso, the doctrine of self-ownership and the principle of compensation, brings him into surprising alliance with welfare "patterned" liberals, such as Rawls. Even though serious and fundamental problems have been located in Nozick's libertarian political thought by commentators, in my judgment, his commitment to patterned theories of distributive justice and welfare rights in *ASU* has been neither sufficiently appreciated nor given serious attention in the literature. The present project attempts to fill this surprising lacuna in the literature on Nozick's libertarianism.

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[2] By juridicial rights, I mean rights which are enforceable by the state.

[3] In what follows, I will challenge this reading. In opposition to both libertarian supporters and egalitarian critics of Nozick, I will argue that Nozick's 'libertarian' political philosophy arguably justifies redistributive taxation. For example, I will show in Chapter four that when Nozick says in TEL that an inheritance tax addresses an equality that seems unfair (TEL, 291), he is making explicit what is implicit in ASU as follows: restricting the right of water hole owners in times of extreme water shortage is morally justified because, if they are allowed to charge whatever price they deem fit, they would end up being extremely rich, while those who have lost their water hole would end up being extremely poor (ASU: 179). In short, as I aim to show, Nozick's treatment of bequests in TEL is invited by the idea he implicitly endorses in ASU that departure from the ethic of respect (i.e., the libertarian negative right) may be required in order to avoid catastrophic moral horror. In the case of bequests, the horror would be the expectation that unrestricted bequests would lead to ghastly poverty alongside immense wealth.

To this end, the thesis endeavors to expose some "patterned and redistributive elements" in Nozick's argument in ASU, something no one, to the best of my knowledge, has attempted to do systematically. The principal reason for examining Nozick's work is that doing so, I believe, will improve our understanding of human rights in general, and the rights to liberty and property in particular. My overall purpose is to demonstrate that Nozick's argument conspicuously fails to do what interpreters and Nozick himself seem to think his libertarianism does: his libertarianism is not inconsistent with patterned theories, redistributive taxation and welfarism. I am, of course, aware of the apparent anti-redistributivist emphasis of Nozick's argument in ASU, and thus, I am not suggesting that he seeks to defend the patterned/welfarist conceptions of justice. In other words, my thesis is *not* essentially about the position Nozick sets out to defend or refute; it is about the conclusions and implications that follow from his arguments. In a nutshell, the thesis to be defended is as follows: Nozick's libertarian position, as defended in ASU and recently saluted in *Invariances* and the interview near the end of his life, *unwittingly* justifies a form of patterned theory which sits uncomfortably with his apparent repudiation of redistribution through taxation and welfare programs. In doing so, I hope to show that political libertarians who oppose tax-financed social welfare programs should seek no theoretical support for their positions in Nozick. The corollary of this is that welfare liberals should find Nozick much more congenial than they imagined possible.

Nozick and Libertarianism

Despite the fact that Nozick's name is widely associated with libertarianism, in his later writings, Nozick seems, surprisingly, to criticize his own libertarianism as explicitly defended in ASU. More specifically, his views in *The Nature of Rationality* (TNOR, 1993), *The Examined Life* (TEL, 1989), and *Philosophical Explanations* (PE, 1981), are all meant to abjure his atomistic libertarian views. The entire Chapter two of my thesis is devoted to setting out Nozick's post-ASU writings and their connection to *Anarchy, State and Utopia* (ASU). Suffice it to say that, in his post-ASU writings, Nozick expresses deep skepticism about the atomistic, and apolitical nature of his libertarian framework, as famously put forward in ASU. For example, he acknowledges, quite rightly, that his libertarianism, as defended in ASU, seems to be "seriously inadequate."

> Because it did not fully knit the humane considerations and joint cooperative activities it left room for more closely into its fabric. It neglected the symbolic importance of an official political concern with issues or problems, as a way of marking their importance or urgency, and hence expressing, intensifying, channeling, encouraging, and validating our private actions and concerns toward them (1989: 286-7).

He later reaffirms his repudiation of his 'atomistic' libertarianism by contending that

> The political philosophy in *Anarchy, State and Utopia* ignored the importance to us of joint and official serious symbolic statement and expression of our social ties and concern and hence (I have written) is inadequate" (1993: 32).[4]

Thus, it is not unreasonable to say that Nozick reverses himself by denying his libertarian atomistic assumption that individuals are ontologically prior to the state. Indeed, some philosophers go as far as to say that "Nozick finally announces his abandonment of libertarianism" (Hailwood 1996: 103, cf. Gaus in Schmidtz 2002: 106, 127) in his later writings.

While Nozick undoubtedly moderates his libertarian views in ASU, I think it would be too much to say that he purposely abandoned libertarianism altogether. It is important to stress that in his post-ASU writings, where he engages in self-criticism and confesses that his libertarianism is inadequate or incomplete[5], his confession is not accompanied by the presentation of a new theory to replace the old one. In fact, in his *The Examined Life* where he overtly concedes that his libertarian position is "seriously inadequate", he makes it clear that by that he does not intend to replace his libertarian principles with another ideology: "In these remarks I do not mean to be working out an alternative theory to the one in *Anarchy, State, and Utopia*,… I am just indicating one major area—there may be others—where that theory went wrong" (TEL 286-287). In short, while he acknowledges that his libertarian position is not flawless, he does not jettison that position in favor of a non-libertarian one.[6]

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[4] For a detailed analysis of the above passages, see Chapter two

It should further be emphasized that in his last book, *Invariances* (2001), as we shall see in Chapter two, Nozick unequivocally reaffirms his libertarian position. Indeed, Chapter five of his book is devoted to quashing any skepticism about his libertarian credentials. Although the ethical view he propounds in *Invariances* places more emphasis on evolution, he believes his central views therein are compatible with his earlier libertarian values. As we shall see in Chapter two, some libertarians, including Narveson, are convinced that the emphasis he places on coordination of behavior and cooperation to mutual benefit is consistent with libertarianism. While on page 280 of *Invariances* he acknowledges the 4-level structure of TEL, he recommends the principle that no society should coercively demand adherence beyond the level of the ethics of respect, which is equivalent to the Lockean individual rights of ASU. Congruent with his libertarian views, Nozick maintains that if we enforce more than the most basic level or individual negative rights, we are exhibiting lack of respect for the voluntary choices of people, and thus unjustifiably interfering with them in coercive ways. In short, in *Invariances*, Nozick seems to cling to his libertarian minimal state, with its corollary Entitlement Theory, with a nod to higher moral value that one might pursue as a matter of *personal choice*. However, in Chapter two, I will challenge Nozick's libertarian status in *Invariances*. We may discount this for now.

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[5] Given that Nozick himself says his libertarianism is inadequate, it is quite surprising that some scholars have interpreted him as saying that he repudiates his libertarianism as articulated in ASU. The words 'inadequacy' and 'repudiation' are far from being synonyms!

[6] Despite Nozick's insistence that he never abandons ASU's libertarianism, I will contend in Chapter two that his explicit subscription to democracy and a non-atomistic conception of personal identity in some of his later writings makes him an *explicit* defender of redistribution. Thus, while ASU is implicitly redistributive, arguably, his post-ASU is explicitly redistributive. My general thesis to be defended can be schematized as follows: ASU's *implicit* redistributivism + post-ASU's *explicit* redistributivism = Nozick's nonlibertarianism. If the thesis to be developed is cogent, then Nozick cannot say that 'he never abandons his ASU libertarianism' since the views expressed in ASU are not libertarian, to begin with.

It is also worth mentioning that in a recent interview with *Laissez Faire Books'* Associate Editor Julian Sanchez, Nozick unambiguously and emphatically reaffirms his libertarianism, insisting he has not ceased his allegiance to the libertarian view. Below is an excerpt of the interview:

> **Julian Sanchez:** "In *The Examined Life* (1989), you reported that you had come to see the libertarian position that you'd advanced in *Anarchy, State and Utopia* (1974) as 'seriously inadequate.' But there are several places in *Invariances* where you seem to suggest that you consider the view advanced there, broadly speaking, at least, a libertarian one. Would you now, again, self-apply the L-word?"
>
> **Robert Nozick:** "Yes. But I never stopped self-applying it. What I was really saying in *The Examined Life* was that I was no longer as hardcore a libertarian as I had been before. But the rumors of my deviation (or apostasy!) from libertarianism were much exaggerated. I think this book makes clear the extent to which I still am within the general framework of libertarianism, especially the ethics chapter and its section on the 'Core Principle of Ethics.'"[7]

Succinctly put: Nozick adamantly maintains that he has been a *consistent* libertarian all the way through. That being said, it is not clear how his re-affirmation of ASU doctrines could be made to cohere with what he wrote between ASU and *Invariances*. In particular, as we noted earlier, in some of his post-ASU writings, he unquestionably reverses the ontological priority he had given to the abstract individual in ASU. Thus, if one considers his explicit ideas in *Invariances* through the lens of intervening works — works where he explicitly rejects the atomistic conception of selfhood — it is not clear why Nozick maintains that he has never stopped being a loyal libertarian. Indeed, one might say that what seems to be a re-affirmation of his libertarian position in ASU is somehow a revolutionary change.[8] Given the apparently non-libertarian views expressed in some of his writings after ASU, it is surprising that Nozick "pretends" nothing radically changed in his journey from *Anarchy State and Utopia* to *Invariances*. Consequently, as far as his post-ASU writings are concerned, minus *Invariances,* detractors of Nozick are justified in questioning his libertarian credentials.

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[7] For more on the interview, see http://www.theadvocates.org/celebrities/robert-nozick.html

[8] Since my primary objective in this thesis is to demonstrate that even his position in ASU justifies redistribution via taxation, I shall not take Nozick to task for being inconsistent.

What if Nozick Abandoned Libertarianism? Is ASU Still Worth Exploring?

Given that some scholars are convinced that Nozick himself somehow abandons his libertarian philosophy in ASU, notwithstanding his own protestation to the contrary, the natural question is this: why should one write a doctoral dissertation on Nozick's philosophy, with special reference to the political philosophy in *Anarchy, State, and Utopia*? Some might think it a waste of time and energy to write a work on Nozick's libertarianism because of his own apparent skepticism of it. Some might go so far as to say that attacking Nozick's libertarian views amounts to attacking a straw man. I argue that since Nozick considers himself as an unswerving proponent of libertarianism, coupled with the fact that most, if not all, libertarians continue to take inspiration from him, it is not out of place to examine his libertarian position in ASU. *Even if,* as I shall make clear later, Nozick truly rejects his libertarian position outright, one is still justified in exploring his position in ASU, since he might be wrong in his rejection. Indeed, judging from the disproportionate amount of attention that ASU has received relative to his later writings, one might reasonably say that it is his work in ASU that will stand as his most significant and enduring contribution to philosophy in general.[9]

In my opinion, the fact that Nozick himself disowned (some aspects of) his libertarianism does not diminish the philosophical value of his book. Nor does it render work on ASU valueless. It is an indisputable fact that the "late" Wittgenstein rejected the bulk of his former philosophical self — the *Tractatus,* he wrote, contains "grave mistakes"[10] — yet no scholar would seriously suggest that we need not discuss his earlier work, neither in its own right nor in relation to the writings of the later Wittgenstein.

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[9] It is interesting to note that most libertarians continued to quote passages from ASU to buttress their points of view even *before* Nozick's re-endorsement of his libertarian principles in ASU. In other words, the seemingly non-libertarian views in his post-ASU writings before *Invariances* didn't deter libertarians from associating Nozick with libertarian philosophy. It should also be mentioned that at his funeral and obituaries, scholars from various fields of study consistently eulogized Nozick for his libertarian ideas in ASU, as though ASU was the only book he authored. This seems to suggest that in the academic world, Nozick is still regarded as a libertarian. It further suggests that ASU is the work for which he is best known.

[10] Wittgenstein, *Philosophical Investigations,* Viii

To say that ASU is not worth exploring because Nozick himself 'rejected' libertarianism is, in my judgment, tantamount to saying that there is something about self-criticism that necessarily makes it a good thing. I am aware that most of us usually commend those who refute their previous points of view, interpreting it to mean development or maturity. However, while self-criticism is sometimes commendable, we should not ignore the real possibility that a person might exercise misguided self-criticism. Given that Nozick, like all mortal beings, is fallible, it is worth the effort to examine his views to see whether he is right in his assessment of his earlier libertarian views. Nozick himself expresses his detestation of philosophers who write "as though their authors believe them to be the absolutely final on the subject" (ASU: xii). Or as he puts it elsewhere: "My own philosophical bent is to open possibilities for considerations. Not to close them ...not to demonstrate conclusively that they are correct" (2001: 3). Or as Wittgenstein writes in the Preface to *Philosophical Investigations* "I should not like my writing to spare other people the trouble of thinking. But, if possible, to stimulate someone of thoughts of his own" (p. viii). I share the sentiment of both Nozick and Wittgenstein. Since philosophers do not posses a monopoly on truth, it would be 'unphilosophical' and dogmatic of us to accept or reject Nozick's ASU merely on the basis of what he says.

From the perspective of pure critique and reflection, no philosopher with an interest in political and moral matters should deny himself or herself acquaintance with Nozick's libertarianism. Indeed, one might say that it is a "must" for anyone with a serious interest in (natural) rights to read and examine ASU. Thus, I am in total agreement with the Laissez Faire Books' editor Roy Childs that "*Anarchy, State, and Utopia* will always be one of those "desert island" books, on that tiny list of books you'd take with you if you were cut off from everything else."[11] It is not unfair to say that in the field of analytical political philosophy, ASU has already gained the status of a classic alongside Rawls' *A Theory of Justice*. The last chapter of my thesis is devoted to spelling out some of the philosophical significance of ASU in the debate of contemporary political philosophy. Suffice it to say that, despite my criticism of Nozick, my general evaluation of his work is that it is a significant contribution to the philosophical controversy over rights, liberty and property.

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[11] http://www.igreens.org.uk/anarchy_state_and_utopia.htm

Methodology and Approach of Work

Anarchy, State and Utopia gave rise to scores of criticisms. Some scholars were emotionally aggravated by it; Brian Barry, for example, wrote that Nozick, "from the lofty heights of a professional chair, is proposing to starve and humiliate ten percent or so of his fellow citizens" (Barry 1975: 331). In short, most detractors maintain that the conclusions of ASU are so uncongenial and callous that they should not be taken seriously as political philosophy at all. Others insist that Nozick's Entitlement Theory is so patently cruel that it requires no further refutation or philosophical scrutiny. Thus, they imprudently dismiss Nozick as an ideological aberration. I do not share this assessment. I think Nozick's philosophical opponents proceed far too quickly in dismissing his argument. Their determined attempts to tear down Nozick's argument have sometimes caused them to miss, I believe, its power and force.

Although I disagree at the most fundamental level with Nozick's conclusions in ASU, I believe his argument there is less vulnerable than some critics seem to think. This being so, in assessing Nozick's argument, I will adopt a more sympathetic approach: instead of inveighing against his entire argument, I will rather devote a considerable amount of energy trying to interpret his positions in a manner that makes the best of them. As well, I will often try to bring out some arguments and presuppositions that Nozick keeps to himself, and try to strengthen them in order to see what is right about them, and also to vindicate him from his harshest critics. Occasionally, this strategy will make it look as though I am defending various Nozickean positions. However, that need not necessarily be the case. My ultimate goal is to show that even the improved form of Nozick's argument does not justify his intended conclusions. In accomplishing this goal, I will do more than merely describing or explaining his arguments. In short, my approach will be both explicative and analytical of Nozick's views.

While the later part of the thesis is essentially an examination of his views in ASU, I will occasionally examine some of his post-ASU views. Other authors' works will be employed to cast light on various Nozickean positions. In other words, although I will be discussing the views of philosophers, including Locke, Kant, Rawls, Gauthier and Narveson, I will use portions of their works germane to my overall argument. While this approach might fail to do justice to the full scope of these philosophers' views on certain crucial issues, it is a comfort to note that I will be following the venerable tradition of Nozick, who unhesitatingly picks out of Kant and Locke whatever he thinks is of use for his own purposes.

The Structure and the Organization of this Thesis

This thesis is divided into six chapters. Among other things, Chapter one focuses on Nozick's derivation of the minimal state, i.e., his so-called invisible-hand argument. The bulk of this chapter is devoted to explaining why Nozick maintains that the minimal state emerges without violating any rights. However, the chapter also reveals some problems with Nozick's derivation of the minimal state. More specifically, it challenges Nozick's dominant claim that the minimal state is morally impeccable because it can be reached through a voluntary process. Furthermore, the chapter sets out Nozick's entitlement theory and explicates why he thinks it is the only theory that is demonstrably compatible with natural rights. The chapter concludes by critically examining Nozick's contention that justice is achieved and preserved only by the principle of the entitlement theory.

Chapter two addresses relation of Nozick's later writings to his endorsement of libertarianism in ASU, examining the reasons that have led most commentators to conclude that Nozick's thought took directions inconsistent with the version of libertarianism in ASU, in which only negative rights can be coercively enforced by the State. The chapter proceeds by exposing some apparently troubling incoherencies in Nozick's political *oeuvre* with an eye to demonstrating that his post-ASU political writings, including *Invariances* (2001), are inconsistent with fundamental values that underlie libertarianism.

Chapter three discusses the view of rights sustaining Nozick's entitlement theory. Kant and Locke scholarship informs my critique of Nozick's attempt to cloak his ideas in their philosophies. The chapter argues that Nozick's theory of justice in acquisition is not faithful to its alleged roots in *Locke's Second Treatise*, and that his allegedly Kantian conception of moral agency is similarly flawed. The main argument in this chapter is that within the Lockean natural right theory, as well as within the Kantian side constraints view, there is indeed a strong argument in favor of redistribution through social welfare legislation. Thus, the chapter concludes that in cloaking his core ideas in the philosophies of Kant and Locke, Nozick cannot, arguably, argue against redistributive taxation without undermining the fundamental building block of his libertarianism.

Chapter four, the crux of my thesis, attempts to show that Nozick's libertarianism in ASU requires, and is undergirded by, a commitment to welfare programs through redistributive taxation. The chapter contends that in accepting the Lockean proviso, with its concomitant egalitarian premises, into his theory, and in making the plausibility of his argument rest on the proviso, Nozick has already infected his own libertarian views with just the same sort of redistributivism and welfarism he vehemently impugns. The chapter proceeds by examining some of the considerations that purportedly support the view that libertarians can get along *without* the Lockean proviso, and the theory of compensation mandated by the proviso. The chapter contends that the Lockean proviso, though incongruous with the libertarianism, cannot be rejected without sacrificing the intuitive plausibility of libertarianism.

Chapter five explores the implications the thesis of self-ownership has for the theory of property rights and redistribution through taxation. The chapter seeks to disparage the libertarian idea that redistributive taxation necessarily violates self-ownership. The main conclusion of this chapter is that the doctrine of self-ownership, as construed by libertarians, underdetermines questions of ownership in external resources, and that taxation and welfare programs need not violate self-ownership.

Chapter six, the concluding chapter, is devoted to showing *further* why 'welfarist' non-libertarians should not be afraid of Nozick. Against the claim that

Nozick's system is 'callous' and 'useless', the chapter argues that since Nozick's Entitlement Theory applies to governments in ideal states, contemporary non-ideal welfare states are immune from his ASU critique of welfare states. Indeed, the historical entitlement theory, when applied to non-ideal societies, will rather instigate an egalitarian redistributive state. Thus, the thesis concludes that welfare liberals should regard Nozick as a theoretical ally, since Nozick's libertarianism comes perilously close to transmogrifying into the 'welfare state'— a Nozickean nightmare!

Chapter One

The Argument for the Minimal State and the Entitlement Theory

Introduction

Libertarianism, in its most familiar formulation, is a political thesis that is concerned with the legitimate role of the state. At the core of libertarianism is the claim that the legitimate role of the government is limited to the protection of negative rights to life, liberty and property. Libertarianism, in short, as understood in current moral and political philosophy, is the acknowledgement or recognition that the sole purpose of legitimate political power is simply the protection of people's natural rights. Any infringement of those rights by individuals and *especially* by governments is morally illicit. The function of a state, from Libertarians' standpoint, is exclusively negative, i.e. it is incumbent upon the state to prevent its citizens from interfering with others' rights but not to ensure that they subsist. Libertarians, notwithstanding their differences, are unanimous in maintaining that each person has the right to dispose of his or her own person, and, particularly his/her property, however he/she wishes, provided that the similar rights of others are respected. Any distribution that occurs in the operation of a free market without violating natural rights is therefore just since, according to them, at no stage have anyone's rights been unjustifiably violated. As long as all the exchanges are purely voluntary, any forcible redistribution of resources from one group to another, from libertarians' perspective, constitutes a transgression of rights.

In the academic world, libertarianism is essentially and indissolubly associated with Robert Nozick's name, who is often cited as a paradigmatic example of a libertarian. As Narveson, one of the famous libertarians acknowledges: "*A S & U* has become the canonical text for libertarianism—the text that makes it unnecessary for the rest of the philosophical world to read anybody else".[1] Of course, this is not meant to denigrate the work of other libertarian theorists. Rather, it is only meant to show why it is befitting to take Nozick as the key exponent of libertarianism, notwithstanding the apparent non-libertarian views espoused in some of his later writings.[2] By this, I do not mean to imply that libertarians regard the views expressed in ASU as the gospel truth. I am aware of numerous libertarian literatures that have flowed under the bridge since the publication of the book. Indeed, some analytic libertarians have recently joined non-libertarians in repudiating ASU. However, as I shall contend, despite libertarians' criticisms of Nozick, they do not really advance the minimal state or the entitlement theory beyond Nozick's account. For example, as I shall argue later, despite Jan Narveson's trenchant criticism of Nozick, his own version of libertarianism is virtually indistinguishable from Nozick's. In saying this, I am obviously agreeing with James Child that, despite Narveson's apparent criticisms of Nozick, he "follows Nozick in providing insightful discussions on rights, property, the market, and libertarian policies" (Child, 1994: 724).[3] Thus, I deem it apt to concentrate on the views of Nozick because I believe his *fundamental* views in ASU represent the views of most, if not all, libertarians. Consequently, I presume the problems that we will encounter in our explorations are indicative of the troubles most libertarians will encounter in dealing with the notions of liberty, rights, and property.

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[1] He indicated this in his interview with P.M. Jaworski: http://www.peterjaworski.com/Jan

Some Varieties of Libertarianism

Libertarianism comes in several shapes and forms, and some are more extreme than the others. At the least strict end of the libertarian spectrum stands philosophers like F.A. Hayek (1960) and Milton Friedman (1962), who fervently defend the free market and the ideal of limited government. While Hayek and Friedman join other libertarians in arguing that welfare, education, and health care could be done better by private corporations and charities, they allow a *substantial* role for government in some of these areas. Hayek, for one, though not a supporter of the expansive welfare states, vigorously defended a very minimal, state-administered social safety net for those who are incapable of supporting themselves in the market. At the other extreme end stands what is sometimes called anarcho-capitalism, or anarchism for short. Murray Rothbard (1998) and David Friedman (1989) are famous proponents of anarchism. On their view, there is no legitimate role for the state at all. Consequently, they advocate the complete abolition of governments.

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[2] Indeed, the Laissez Faire Books editor Roy Childs wrote in 1989 the following "Nozick's *Anarchy, State*, and *Utopia* single-handedly established the legitimacy of libertarianism as a political theory in the world of academia. Indeed, it is not too much to say that without Nozick's book, there might not be a vital and growing academic libertarian movement today, making its way from university to university, from discipline to discipline, from nation to nation." (http://www.igreens.org.uk/anarchy_state_and_utopia.htm)

[3] I do not mean to slight Narveson's contribution to libertarianism. On the contrary, as far as I am concerned, his Neo-Hobbesian contractarian defense of a libertarian morality of negative rights is highly ingenious and original. That said, I insist that his contractarian defense of liberty cannot succeed apart from Nozick's libertarian ideals.

In between these two extremes stands what is most commonly known as minimal state libertarianism or "minarchism", as opposed to anarchism. Defenders of this view include Ayn Rand (1967), Ludwig von Mises (1978) and Robert Nozick (1974). While proponents of this view, unlike anarchists, hold that there is a legitimate role for government, they maintain that that role is extremely limited. From the perspective of these minimalists, the state's *only* proper function is to protect individuals' negative rights. Because the minimalists are not opposed to governments, their rejection of taxation is not absolute. Nozick, for one, allows for whatever taxation is required in order to fund the activities of the minimal state.[4] These include taxation to fund defense, the police and the administration of justice. By contrast, the anarchists' rejection of the legitimacy of any state whatsoever has logically compelled them to look upon *all* forms of taxation as legalized robbery committed by the state. Since my project is about Nozick's version of libertarianism, I will focus on minimal state libertarianism. Thus, in what follows, unless otherwise indicated, I shall use libertarianism and the minimal state libertarianism as synonyms.

Before I proceed, I would like to alert the reader to my general orientation towards Nozick's libertarianism. To start with, I believe Nozick is a closet liberal or *if* he is a libertarian, his libertarianism is a benign one: his 'libertarian' political philosophy is not inconsistent with redistributive taxation. While on standard interpretations, ASU is taking as morally precluding state intervention; thus denying the moral permissibility of redistribution through taxation and welfare programs, I will argue that the Nozickean libertarianism of ASU needs to be construed as rather permitting state interventions as morally permissible. In other words, my general contention is that Nozick's ASU version of libertarianism itself requires, and is grounded in, a commitment to the value of welfare programs funded through redistributive taxation.

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[4] Nozick seems to hold that the amount would only reflect competition among protection agencies. In other words, the inhabitants of the minimal state would be charged only an amount they would have spent anyway for protection.

While some libertarians, including Narveson, concede that Nozick's endorsement of the Lockean proviso commit him to a kind of redistributivism, they insist that Nozick is still a moderate libertarian, or a 'confused' libertarian at worst. Although this reading of Nozick sounds plausible, it does not refute my thesis that Nozick's libertarianism is not as insensitive to the plight of the poor. I will argue that since Nozick's 'libertarian' views converge on liberal welfarism, welfare liberals should not be troubled by Nozick's libertarianism. Before I defend my thesis, however, I would like to examine some of the considerations that purportedly support the view that Nozick's libertarianism is inimical to the plight of the poor.

Nozick's Core Argument in ASU

In ASU, Nozick attempts to present a rigorous theoretical case for individualist libertarianism or what one might call laissez~~-faire~~ individualism, stressing that government should do no more than protect citizens from violence, theft, and breach of contract (ASU: ix). In short, the state in Nozick is nothing more than institutionalization of people's negative natural rights. Anything *more* than the minimal state violates those rights, and anything *less* does not offer full protection to the rights that individuals have.

The single most defining characteristic of Nozick's libertarianism is its absolute commitment to individual rights. The rights of individuals are ostensibly accorded the highest weight in ASU. While Nozick completely agrees with libertarian anarchists that "individuals have rights, and there are things no person or group may do to them (without violating their rights)" (ASU: i), he vehemently disagrees with them that the very existence of the state necessarily violates rights, and thus *even* a minimal state is inimical to peoples' natural rights[5]. In opposition to the anarchist,

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[5] It should be pointed out that Nozick of *Invariances* sees Lockean rights as an evolutionary emergence from mutually beneficial cooperation. In other words, he does not use the term 'natural rights' in *Invariances*. Rather, he justifies (negative) rights by reference to their genealogy in mutually beneficial cooperation. This is not to say that that Nozick abandons his natural (Lockean) right libertarianism.

Nozick contends that the state, if strictly confined to the minimal, or what has traditionally often been referred to as the "night watchman," state, will possess its own legitimate *raison d'étre*. However, against the proponents of more-than-minimal state, Nozick maintains that only the minimal "night watchman state" can be shown to be morally congruent with the rights of individuals.

Nozick divides his book into three parts, as its title indicates: the first part seeks to establish the legitimacy of the minimal state by deflecting the claim of individualist anarchists that the state, by its very nature, is immoral in the sense that it violates peoples rights; the second part is devoted to demonstrating the logical impossibility of going beyond the minimal state without encroaching upon rights. The third and final part explains how the minimal state can provide a meta-utopian framework for voluntary associations, communities, and utopian experiments. Here, Nozick draws some implications designed to make the libertarian framework appear more attractive and "inspiring." While Nozick concedes that his minimal state, or "state-like-entity", as he sometimes calls it, is antithetical to welfare redistributivism, the arguments of Part three are designed to convince us that it is an ideal worth fighting for.[6]

Even though I think his arguments of Parts III and I are philosophically illuminating, in what follows, I propose to subject only the argument of Part II to rigorous examination and criticism. My reason for confining my critical analysis to Part II is that it is that part that has proved to be the most original, influential and undoubtedly controversial of Nozick's book. By contrast, while Parts III and I are not problem-free, *some* of his views there are at least intuitively plausible[7]. For example,

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Indeed his genealogical approach is intended to justify the Lockean natural rights. I will have more to say about this in Chapter two.

[6] Nozick's point seems to be that though the minimal state appears callous to the needy, it should not 'put them off' since it only constitutes a kind of *utopia*. On his view, the plausibility of the minimal state rests on the fact that it is the only model of political order that makes possible the attempt to realize *every* person's and group's vision of the good society at the same time. This being so, within the boundaries of the minimal state, the poor may choose to live according to socialist or egalitarian principles, as long as they do not impose their socialist or egalitarian conception on others.

[7] I say "some" because 'some' of the views expressed there can be said to be highly controversial. For example, his vehement condemnation of unrestrained democracy as a form of slavery is highly contentious. Though democracy is a decision procedure which requires the minority to comply with the wishes of the majority, thus necessitating a coercive state apparatus, most people (excluding Plato, of course,) still regard democracy as the best form of government. Consequently, one might plausibly

our intuitions and commonsense appear to support Nozick's thesis that a (minimal?) state is needed to safeguard our rights. Since the individual anarchist wants to "be left alone", but since some people will, by all means, not leave him/her alone, the anarchist will need a state to protect him/her against those who will not leave him/her alone. Simply put, it is difficult, if not impossible, to conceive of a stateless society where rights are always respected. Given this fact, I think all liberty lovers should favor some government, even though that would mean supporting some taxation. Thus, in my estimation, the anarchist's rejection of the state, no matter how infinitesimal it is, seems inherently contradictory.

Predictably, the individual anarchist would respond by saying that in the absence of the state, people would voluntarily respect the rights of others, since most people are decent enough to respect rights. However, while it cannot be denied that some people possess the character to voluntarily respect others' rights, it is hard to justify this wholesale optimism, given the obvious fact that not all people are actually naturally "decent'. If all human beings were innately good and law-abiding, then the anarchist would be right in insisting that we would not need a state or government in order to respect others' rights. But to assume that people would always respect rights without state interventions, is to assume that societies are always full of angels, an assumption which significantly distorts human nature. It cannot be denied that in the absence of coercive authorities, some people will choose to violate the rights of others.[8] Given our experience with human nature and interaction, it is not unreasonable to say that there will always be right violations. As reality has shown us, in times of civil war or political mayhem, talk of rights is rendered meaningless, as rights are routinely violated with impunity. To be sure, recorded history has shown this time after time. In particular, the history of the 19th and 20th centuries demonstrates that rights of individuals are encroached upon most egregiously during times of wars and lawlessness. The overwhelming historical evidence indicates that

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dismiss Nozick's equation of democracy with slavery as hyperbole. Indeed, Nozick candidly admits that his own view "has been a minority view thus far". Also, Part I contains Nozick's assertion of 'atomism (ASU: 32-3), which some philosophers, including myself, find problematic.

[8] Even Hume who argues that civil coercive authority is not absolutely necessary because human beings are naturally sympathetic, rightly concedes that as society becomes more and more complex, coercive authority will ultimately be needed.

individual rights cannot be safeguarded in the absence of 'coercive' governments. Stateless societies like Afghanistan and Somalia attest to this claim.[9] The individual anarchist's claim that well-behaved private protection services will peacefully fill the power vacuum is highly speculative and unsupported by history and experiment. Indeed, to heed to the admonition of the individual anarchist and abolish all forms of governments would be an incredibly dangerous experiment, likely leading to more right violation, not liberty.

Drawing from these commonsense practical notions, I concur with Nozick, against the individual anarchist, that we cannot fully enjoy our rights in a stateless society. To put it more colorfully, a stateless society will inevitably result in a "rightless" society. Given this fact, I will not take Nozick to task for dismissing the anarchist position as disconcertingly implausible and self-refuting. That said, among other things, I will contend that Nozick's own argument against the individual anarchist sometimes commits him to endorsing *more*-than-minimal state. Otherwise stated, in support of Nozick, I will maintain that we need a state in order to fully enjoy our rights; however, in opposition to Nozick and other "minimalist" libertarians, I will argue that we need more than the libertarian minimal state to enjoy the exercise of the Lockean rights, the rights to which Nozick unquestionably and wholeheartedly subscribes.[10]

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[9] It might be replied that this could be because of where we are in history. One might speculate that the perhaps remote future will be a time of great plenty. Arguably, the argument continues, under conditions of plenty the need for a state would 'fade away'. However, I think this is too an abstract possibility to be taken seriously. Besides, critics of anarchists might equally speculate that the perhaps the remote future will be a time of 'more' scarcity, and under conditions of 'more' paucity, the need for the state would rather intensify. The bottom line is this: since the detractor's argument above involves speculations about the future, it makes it is extremely difficult, if not impossible, to evaluate it.

[10] Presumably, libertarians would impatiently retort that since the *sole* purpose of legitimate political power is simply the protection of peoples' natural rights, governments are not required to protect citizens' power to exercise their natural rights. Thus, libertarians would dismiss my claim as conflating the distinction between rights and the power to exercise them. While I readily concede that protecting one's right is distinct from protecting the power to exercise that right, I will contend in Chapter three that the Lockean rights would be meaningless to us if we could not exercise them.

The Lockean Starting Point

Nozick's starting point for the justification of the minimal state to the libertarian anarchist, and for his repudiation of the more extensive state, is Locke's theoretical state of nature. He readily takes over Locke's conception of state of nature with its corollary claim that most people, more often than not, act as the moral law (what Locke calls "The Law of Nature") commands. Individuals in Locke's state of nature, on Nozick's interpretation, are

> In a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or dependency upon the will of any other man" (sec. 4). The bounds of the law of nature require that "no one ought to harm another in his life, health, liberty or possessions (sec. 6) (ASU: 10).

In other words, in Locke as in Nozick, persons in the state of nature have full-blown negative rights, rights that correlate with the duties of others to refrain from interference with their exercise. As well, people in this pre-political state generally act reasonably morally. One might, therefore, say, with considerable plausibility, that both Nozick's and Locke's social characterization of the state of nature is considerably less bleak than Hobbes', who famously contends in his *Leviathan* that life in the state of nature is "solitary, poor, nasty, brutish, and short", a condition of war "of every man against every man" (*Leviathan*: 186). While apolitical, Locke's state of nature is by no means amoral. It is a state of liberty but not of license.[11] Since life in Locke's state of nature, in contradistinction to Hobbes', is not necessarily chaotic, if the minimal state *could* evolve from Locke's state of nature without violating individual rights, then, from Nozick's perspective, even the staunchest anarchist would have every reason to recognize its moral legitimacy.

> If one could show that the state would be superior even to this most favored situation of anarchy, the best that realistically can be hoped for, or would arise by a process involving no morally impermissible steps, or would be an improvement if it arose, this would provide a rationale for the state's existence; it would justify the state (ASU: 5).

In this passage, I do not think that Nozick is saying that state is 'superior' on teleological (e.g. benefit) maximizing grounds. If this were his position, he would have a hard time sustaining his criticism of the teleological or utilitarian conception of rights. As we shall see, since Nozick repeatedly and emphatically maintains that consent legitimizes *all* actions, he cannot consistently rest the justification of the state on how beneficial a state would be if it did come into existence. Indeed, all thoroughgoing libertarians, including Nozick, are clearly committed to saying that any government to which its citizens have freely and voluntarily consented is legitimate *even if* that government is a *deterioration* of the state of nature. It is not surprising, then, that Nozick usually resorts to his "process involving no morally impermissible steps" line of argument when he subsequently defends his minimal state against both the individual anarchist and the supporter of the more extensive state. In other words, Nozick point seems to be that the state is "superior" because it emerges without infringing anybody's right. As well, it is 'superior' because it protects the (negative) rights of citizens.

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[11] Locke's moderately pessimistic conception of human nature rationally underwrites his intense philosophical and ethical animosity towards political absolutism. By contrast, Hobbes' extreme pessimism of human nature explains his unflinching support of political absolutism.

It is also worth mentioning that although Locke's state of nature functions as the starting point in Nozick's account of the emergence of his minimal state, Nozick does not invoke the concept of the state of nature to explain the historical origins of his minimal state. Nor does he say that the state of nature is an historical period that actually preceded the minimal state. It should be noted that Nozick seeks to demonstrate how the minimal state *could have* arisen from the postulated "state of nature without anyone's rights being violated" (ASU: 114, my emphasis); it is not necessary for him to establish as an historical fact that the minimal state really came about in a manner that preserved, throughout its transitions, individual rights. The issue is logical or conceptual: we *can* get from the theoretical state of nature, where individuals are fully autonomous, to the libertarian state, while not encroaching upon individual rights.

Given that Nozick's account of the state of nature is hypothetical, one might question the relevance of his account to our 'actual' political condition. The mere fact that a state could be legitimate does nothing to show that any actual state is legitimate. However, this criticism seems to suggest an unwarranted dichotomy between *theoretical could* and *practical would.* While Nozick admits that his account of state of nature is fictitious, he also believes that rational agents would *really* make choices that would lead to a minimal state.[12] Thus, Nozick's argument, though ostensibly fictitious, can be applied to concrete state of affairs. Indeed, in Chapter 9 of ASU, Nozick tries to concretize his theoretical argument by speculating about how a possible *continuation* of the story up to the libertarian minimal state, i.e., how one could go beyond that state to the system of "demoktesis." There can be no doubt that Nozick employs an *empirical* could in this connection. This is so because the continuation is a criticism of modern democratic states; and what critical bite would that criticism retain if it were exclusively a piece of science fiction?

The Lockean State of Nature Minus the Lockean Social Contract

While classical liberals see the conceptions of the "state of nature" and the "social contract" as inextricably linked, Nozick tries to detach these two elements of Locke. Locke's social contract, with its accompanying theory of consent, has met a myriad of criticisms. Hume, for example, has famously ridiculed and stigmatized the notion of social contracts by contending that it is too hypothetical to be binding. According to Hume, whoever finds the theory of consent appealing in the real world would undoubtedly be shut up "as delirious, for advancing such absurdities" (*Hume's Ethical Writings,* 1970: 259).[13] While I believe a hypothetical contract theory has its attractions, these criticisms seem to have robbed Locke's social contract argument of its plausibility. Needless to say that legally and contractually, the only people bound by contracts are those who *actually* sign them. It follows that any genuine theory of contract or consent should be a product of a person's voluntary action. Given this fact, it is not surprising that Nozick sharply breaks with his alleged libertarian predecessors by refusing to take up their social contract arguments. In particular, he finds Locke's theory of consent to be irremediably flawed and absolutely unnecessary (ASU: 18). Because, on Nozick's account, Locke's social contract provides an insufficient basis for establishing political legitimacy, he jettisons Locke's theory in favor of what he calls "an invisible hand" account of the emergence of the state.[14]

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[12] Unlike Rawls who concedes that the parties in the "Original Position" are not real human beings, the parties to the contract in Nozick's conception are imagined very much on the model of real life rational human beings.

[13] Ronald Dworkin has echoed Hume's objections to consent theory. For Dworkin, nothing in the behavior of ordinary citizens of ordinary states can genuinely be taken to count as binding consent to their governments' rule (Dworkin, 1986: 192-193).

The "Invisible Hand" Justification of the Minimal State

Part I of ASU is an attempt to provide an "invisible hand" justification for the state: we end up with a minimal state without any conscious design or plan in mind. For the minimal state to have moral legitimacy, it must evolve through a series of legitimate steps *only*. Nozick takes us through a series of those steps beginning with the postulated "state of nature". Though, as we have noted, the Lockean/Nozickean state of nature is not the Hobbesian state of war, it is not a state of absolute bliss either. In the state of nature, everyone is his/her own judge in confrontations with other individuals. Consequently, he/she may overestimate his/her own suffering and punish offenders severely. This spins off a process of endless series of acts of retaliation, creating the problem of how to settle disputes impartially. As well, individuals may lack the power to enforce their right to punish, to exact compensation, and to defend themselves.

The practical problems embedded in the state of nature will lead to the creation of the *Mutual-Protection Associations.* (MPAs.) To remain in the state of nature while others voluntarily organize in groups to enforce their rights is to irrationally render oneself numerically vulnerable: "in union there is strength" (ASU, 12). The benefits in forming associations with other individuals will entice others to enter into similar voluntary agreements. Thus, the move toward the formation of MPAs is not guided by any conscious intention on the part of certain individuals, against the desire of others, to form associations. Rather, congruent with the invisible-hand explanation, there is logic internal to the situation that inclines each individual, of his/her own free volition, towards joining such an association.

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[14] Despite Nozick's strenuous effort to dissociate himself from Locke's consent theory, A. John Simmons has argued that all libertarians, including Nozick, are committed to endorsing consent theory. Since libertarians insist that "we possess an unlimited moral power to alienate our rights and to undertake new obligations by free consent, such that even free contracts into slavery are morally binding", (Simmons 2005: 336) they cannot consistently argue against the consent theory. Simmons' argument is superficially plausible, but it misses the point. Nozick does not reject the theory of consent *per se*. The real flaw of Locke's theory, in Nozick's estimation, is that it is not a product of citizen's consent or voluntary action. Nozick and libertarians are against any theory that deprives citizens of genuine choice or consent. Nozick's case against taxation rests on the nonconsensual nature of taxation. Indeed, consent is the touchstone of the legitimacy of his minimal state. Nozick rejects the version of Locke's theory of consent, not the consent theory in general. Thus, against Simmons, Libertarians can support the theory of consent while rejecting Locke's theory of consent without any inconsistency.

However, when everybody defends everybody within MPAs, too many people use too much time and effort. This practical problem is solved through a division of labor: entrepreneurs set up professional firms—*Commercial Protective Associations* (CPAs)—from which people can buy protection services instead of engaging in time- and effort-consuming mutual protection associations. However, the emergence of CPAs comes with some inevitable problems. Motivated by commercial and financial considerations, CPAs will naturally compete and even battle to win customers. For example, when clients of various agencies come into conflict, each agency will judge that its client should be protected, leading to a battle among agencies. In a series of such conflict, battle and competition, a variety of outcomes are foreseeable: one would *eventually* dominate, and clients of the others would transfer; or else the agencies would form some super-agency for the area, which would adjudicate such conflicts, and enforce its decision; or they would amalgamate. One way or another, they would end up becoming just one agency dominating the market, the *Dominant Protective Association* (DPA). Having managed to wean customers away from *all* its competitors, the DPA seems to enjoy monopoly in this free market.

Although the DPA enjoys a unique position in the market for protection, it only provides protection for those who insure themselves with its services. Some strongly individualistic people, the so-called "independents", who choose to enforce their rights themselves, are left to fend for themselves. The existence of these independents means that the DPA falls short of a *de facto* monopoly of legitimate violence; independents still act on their own, using legitimate violence. "The dominant protective association makes no…claim to be the sole authorizer of violence" (ASU, 117). Though the independents possess the right to enforce their natural rights, their existence poses an extreme risk to clients of DPA. For example, clients will be exposed to a risk of having unjustified injuries done to them by non-clients if the non-clients are allowed to exercise their rights. Additionally, and significantly, there is the risk that independents will overestimate their own suffering and thus punish the dominant protective association's clients too severely in cases of conflict. Since the reliability of the judicial process used against the DPA's clients cannot be established, and since people have the right to be judged in accordance with procedures known to be reliable, clients will rightfully demand that their agencies protect them from independent right enforcers. To eradicate or assuage "general apprehension and fear" (ASU: 66) in its clients, the DPA has to defend its client against independents by prohibiting them from exercising their natural right to enforce their right of self-defense. In doing so, according to Nozick, the DPA transmogrifies into an *ultra minimal state* with a *de facto* monopoly of violence.

The ultra-minimal state cannot be appropriately described as a *full* state yet, since it does not protect all who live in it. To get from the ultra minimal state to a full state status—or more specifically a minimal state, without impinging upon any rights, *including* the rights of independents—Nozick postulates a principle of compensation, according to which "those who are *disadvantaged* by being forbidden to do actions that only *might* harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others" (ASU: 82-83). Since independents' actions only *might* be harmful, and since being denied the right to self-enforcement undoubtedly *disadvantages* them, the agency is morally obliged to compensate them. As Nozick points out, anything short of adequate money to pay for the services of a protection agency would be insufficient compensation for the independents, who now are deprived of enforcing their natural rights. In short, Nozick believes the most expedient sort of compensation will be in the form of protection services for independents. The cost of the protective services is borne by the existing clients, since they are *morally* required to transform the ultra minimal state into a minimal state (cf. ASU: 119).

When the ultra minimal state, through its clients, compensates independents in this particular way, it becomes a fully-fledged minimal state, meeting the two "Weberian" requirements, endorsed by Nozick, of a legitimate state: it claims monopoly over the legitimate use of force in a geographical area, and it offers protection to all the inhabitants in the territory. In sum, through the principle of compensation, the ultra-minimal state *becomes* a minimal state; it moves from the status of a *de facto* monopoly to the status of a *de jure* monopoly on force, and changes from offering protection to clients only to offering protection to *all* people residing within its boundaries.

Since the clients of the minimal state are morally obligated to pay for the services provided to the independents, one might be tempted to say that there are elements of "welfare redistribution" in Nozick's minimal state, and thus his argument against redistribution through welfare programs is self-refuting. However, to succumb to this temptation, from Nozick's point of view, is to misconstrue his derivation of the minimal state. The apparent "redistributive" element in the minimal state is not based upon redistribution, as understood in welfare states, but *solely* upon the principle of compensation. The clients of the minimal state must pay compensation for not allowing those non-clients to exercise their natural rights. Accordingly, this type of redistribution is motivated by consideration of natural rights recognized by the libertarian. The "redistribution" or compensation ceases as soon as the minimal state is fully established, i.e., as soon as all the independents join the minimal state.[15] Consequently, Nozick optimistically insists that his principle of compensation, unlike redistribution in welfare states, does not violate anyone's right.

While the principle of compensation ensures easy transition from the ultra minimal state to a complete minimal state, the principle seems to threaten his endeavor to show that the minimal state can be reached through a voluntary process, and hence is morally legitimate. The compensatory services appear to be an *imposition* on the independents, thereby violating their rights to autonomy or self-determination. In order to respect the rights of the independents, they are to be given a choice of accepting or declining the protection services. Surprisingly, the independents are deprived of exercising this essential right to choose. More surprisingly, Nozick does not give us any argument justifying why they are not given the choice to suggest the form of compensation they themselves deem most expedient. He seems to *assume* that the protection services would be so "beneficial" to them that even if they were given the choice, they would be motivated to opt for the protection services as the most appropriate form of compensation anyway (See ASU: 72). While this does not appear an implausible assumption, it requires justification. To be sure, one might say that that assumption is unwarranted since there are some independents who might not be willing to accept the protection services as the form of compensation in exchange for the transgression of their rights. It cannot be disputed that some people value rights so much so that no amount of "compensation" would justify violation of their rights. Besides, Nozick's theory of compensation seems to commit him to saying with end-state theorists that we can violate people's rights as long as our compensation would be beneficial to them.[16]

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[15] It should be pointed out that after the formation of the minimal state, both the original clients of the agency and the previously independents are required to pay taxes for the protection of their rights. This kind of taxation, however, according to Nozick, does not constitute violation of rights since members pay voluntarily. Indeed, one might say that the former independents have no legitimate reason not to pay since they would be charged only an amount they would have spent anyway for protection. Thus, the minimal state would not impose any "extra" charge on them. Whether this kind of "taxation" is a benign one is a task I will take up in Chapter 5.

In short, it is difficult, if not impossible, to square Nozick's covert assumption that the independents would accept the protection services as the most expedient form of protection with his stringent leaning on the Kantian deontology of rights, which preaches inviolability of rights. As we shall see, within the framework of his "side constraint" theory of rights, Nozick insists there are rights, that each person ought to be assured (ASU: 30-35). Thus, since the independents' rights to choose to turn down the protection services are disregarded, it is not unfair to say that his principle of compensation runs afoul of his Kantian side-constraint view, which treats rights as inviolable. Given the apparent violation of the rights of the independents, Nozick's repeated claim that his minimal state emerges without violating any rights becomes highly dubious.[17] I think Nozick is aware that anything other than protection services will inhibit the establishment of the minimal state, hence his preparedness to impose the protection services on the independents. His principle of compensation is so crucial to the formation of the minimal state that he seems coerced to sacrifice part of his otherwise stringent deontology for the consequentialism, thereby significantly vitiating his criticism of the patterned or consequentialist conceptions of justice.

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[16] Presumably, Nozick would try to distance his theory from consequentialists and other end-state theorists by contending that his theory of compensation ensures that *only* those whose rights are violated benefit from the compensation. Admittedly, a utilitarian or consequentialist would allow for right violations or border crossings, as Nozick would put it, where benefits were maximized, however a consequentialist theory would not always require that these crossings be compensated for. This admission, however, does not really exonerate Nozick. Indeed, it rather makes Nozick more open to my "consequentialist" charge: it would commit him to saying that we could justifiably violate individual rights as long as we compensated them afterwards, and providing the compensations benefited *only* those whose rights have been encroached upon. The decisive question is this: why should we violate rights first and compensate later? What if the persons whose rights have been violated refuse to be compensated? To be sure, elsewhere, Nozick surprisingly concedes that there will be situations in which consent will be impossible to secure in advance, but in which *the benefits outweigh the costs*. In these situations, Nozick feels comfortable allowing border crossings in these situations providing compensation is paid afterwards, and providing the crossings do not produce fear (See ASU: 72). All this seems to give credence to my 'consequentialist' reading of Nozick. I will return to this issue later. Suffice it to say that his principle of compensation seems incongruent with his claim that the only thing that legitimizes border crossings (right violations) is prior consent (ASU: 29).

At any rate, having "succeeded" in converting the independents, Nozick optimistically believes we, *including* the libertarian anarchist, are, for all practical purposes, within the minimal state, stressing that it is a *de jure* state that has been constructed through a series of *voluntary* processes. Although the minimal state now possesses both protective and coercive force, it has come to possess this unique or special status through legitimate monopolization of power. The problems of life in the state of nature serve to explain that in the state of nature—the state where the anarchist resides— there is no guarantee that our rights will always be respected. The minimal state provides a remedy for the problems people in that state face by ensuring that the negative rights of all are respected. The logical structure of Nozick's argument against the individual anarchist seems to be this:

1. The libertarian anarchist is the champion of natural rights.
2. The minimal state exists *solely* to safeguard natural rights.
3. Thus, the anarchist is committed to embracing the minimal state.

Nozick therefore believes he has succeeded in rebutting the libertarian anarchist's contention that no state, no matter how minimal it is, necessarily violates rights:

> We have discharged our task of explaining how a state would arise from a state of nature without anyone's rights being violated. The moral objections of the individualist anarchist to the minimal state are overcome. It is not an unjust imposition of a monopoly; the *de facto* monopoly grows by an invisible-hand process and *by morally permissible means,* without anyone's rights being violated and without and claims being made to a special right that others do not possess (ASU: 114-115).

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[17] For this reason, Nozick's claim that even the hardened anarchist would be committed to subscribing to his minimal state seems to have no warrant. Thus, David Miller is right that "the hurdle Nozick sets himself is too high. … it is impossible to show that everyone, regardless of their personal beliefs and ambitions, has an internal reason to accept [the libertarian minimal state]" (Miller, in Schmidtz 2002: 25).

The state's authority, in Nozick's view, resides exclusively in the power individuals have voluntarily placed in its hands to act as the guarantor of their rights. These ideas, as we shall see, feed Nozick's argument that the state has no supererogatory and prerogative power to effect redistribution of material wealth. Any state which engages in forceful distribution unavoidably violates peoples' rights and thus automatically loses its legitimacy. This step paves the way for Nozick to conclude that governments should be held to the same standards as individuals.[18]

Having derived the minimal state from the state of nature without encroaching upon anyone's rights, Nozick proceeds to demonstrate that the minimal state is the only conception of state which does not violate the rights of individuals, especially property rights. In his words: "The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights" (ASU: 276). To achieve this goal, he first tries to refute the claim that a more-than-minimal state is required in order to achieve and maintain a just distribution of goods and resources. Nozick's dominant thesis is that distributive justice does not require a more extensive state than the minimal state; rather, justice is achieved and preserved only by the principle of what he famously calls the entitlement theory. The entitlement theory is therefore embedded in Nozick's defense of the minimal state against "patterned" conceptions of justice. In sum, Nozick's defense of his entitlement theory of justice provides further support for his libertarian minimal state. Since his entitlement theory plays a crucial role in his argument against patterned theories or more extensive states, in what follows, I will set out Nozick's theory and explicate why he thinks it is the only theory that is demonstrably compatible with natural rights.

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[18] Nozick seems to contradict this claim when he argues that the right to punish is possessed not individually, but collectively (ASU: 139-140). His argument clearly implies that the minimal state possesses a larger share of the jointly held right to punish than does any individual.

The Entitlement Theory vs. Patterned Conception of Justice

Nozick contrasts his theory of distributive justice, which he prefers to call the *entitlement theory*,[19] with other theories of justice, which he calls *end-result or current time-slice* and *patterned theories*. An end-state theory concerns itself essentially with the pattern in which holdings end up, and seeks to adjust the pattern to some desired paradigm or outcome. An end-state theory fundamentally seeks to attain a certain kind of *telos*, or goal through a certain (re)-distribution of resources. The doctrine of utilitarianism, on Nozick's view, is a classic example of an end-state theory. A patterned conception of justice basically seeks to implement a distributive scheme according to some patterning principle of the form "to each according to his x, where x is a criterion (e.g. x could be "his ability or his need, or his effort, or his merit or his IQ, or whatever.) The patterned principle can be epitomized as *"From each according to his/her X, to each according to his/her Y."* A patterned theory is *historical* if it requires that we look at what has happened in the past to see if distribution is just, and then specify a criterion or pattern for distribution. A patterned theory is *non-historical* if it ignores what has happened in the past and stipulates a criterion for distribution. In short, both patterned and end-state theories of distribution are about the *structure,* as opposed to the procedure, of property rights of society.[20]

Nozick's entitlement theory of justice stands in sharp opposition to both patterned and end-state principles. The entitlement theory, according to Nozick, is purely historical in the sense that it makes the justice of a given set of holdings depend *exclusively* on the *history* of those holdings, and not on the conformity of the outcome to a given pattern. The entitlement theory simply states that one cannot decide whether redistribution is legitimate merely by looking at the prevailing pattern of distribution; rather, whether a particular distribution is just depends solely on how the distribution came about. Nozick believes his account of justice is unique in insisting that whether a distribution is morally just depends solely on how things were *acquired* and *transferred* between particular people over time. Nozick's entitlement theory is composed of three principles, starting with:

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[19] He thinks the term distributive justice is not a neutral one, since it may mislead us to imagine that the stuff being distributed starts off in some central place from which it gets doled out (See ASU: 149).

[20] While Nozick believes end-state principles are somehow different from patterned principles, he nevertheless rejects both principles as inconsistent with natural rights. Thus, both theories are included under the rubric "redistributive theories." Indeed, his entitlement theory is supposed to rebut both principles simultaneously. As we shall see later, having spelled out the differences between the two, he surprisingly goes on to treat end-state theories as interchangeable with patterned theories, labeling all theories that violate rights "patterned" or "end-state principle". For example, having conceded that Rawls' difference principle is "patterned" but not "end-state", Nozick subsequently avers that "the difference principle is an especially strong kind of *patterned end-state principle*" (ASU: 209, my emphasis). This seems to suggest that he actually believes that patterned theorists are also end-state theorists, and vice versa. Thus, for the purposes of this paper, and for convenience, I propose to follow suit. In other words, I will be using end state principles and patterned principles as though they are synonyms.

1. The Principle of *Acquisition* of Holdings: This refers to the process of how unheld or owned things come to be held by someone. It refers to how people can acquire rights to properties of various sorts.

2. The Principle of *Transfer* of Holdings: This stipulates the conditions under which rights to certain properties can be transferred from one person to another.

If the world were completely just, then all entitlement could adequately be explained in terms of these two principles. That is to say, in an ideal world, principles 1 and 2 would be the only principles of justice that we would need to determine whether a certain distribution of goods is just. Unfortunately, we do not live in an ideal world. In reality, as Nozick rightly acknowledges, there is force and fraud. This being the case, some of the goods possessed by members of current existing society ran afoul of principles 1 and 2 enumerated above. From this, Nozick concludes that in an imperfect world, such as ours, we will need a third principle of justice:

3. The Principle of *Rectification* of Holdings: This seeks to show how to rectify injustices when property is illicitly acquired or transferred (289).[21]

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[21] Though Nozick's theory of property rights has three components, in this paper, I will not focus on the second principle, namely, the principle of transfer. Since you cannot transfer property or return it to its legitimate owner until it comes to be owned by someone or others in the first place, one might say that the principle of acquisition is of fundamental importance to Nozick's entire enterprise. That said, I will contend in Chapter six that the principle of rectification is an equally (if not more) important component of Nozick's theory because, *if* the past injustices have shaped present holdings, then the entitlement theory cannot be invoked to repudiate current redistribution. Thus, I will argue that the successful application of the principle of rectification is indispensable to the theoretical viability of the Entitlement Theory.

In sum, from Nozick's standpoint, if the world were perfectly just, the following inductive definition would exhaustively cover the subject of justice in holdings.

1. A person who acquires a holding in accordance with the principle of justice in acquisitions is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2 (ASU: 151).

The thesis that Nozick is obviously pushing is that if a distribution results from activities which are themselves licit, then anything that emanates from those activities is *ipso facto* licit. Put another way, any distribution in holdings is legitimate provided it did not result from encroachments of the principles of justice governing the initial acquisition of unowned property or the transfer of property previously held by someone. That seems to be the single, simple idea at the core of Nozick's theory. Nozick summarizes the entitlement theory as "*From each as they choose, to each as they are chosen*" (ASU: 160). Justice, according to Nozick, is procedural: if one starts with a just situation and applies just steps, the entire procedure must be just. If distribution in holdings came about in accordance with the rules of acquisition, transfer and rectification, then it is just, however unequal it may be, and however poor others may be. Justice is defined in terms of the entitlement theory, and vice versa. This leads Nozick to the conclusion that even dire human need, such as rights to life, cannot automatically override the entitlement theory (ASU: 179).[22]

Nozick's non-patterned historical account of justice has generated criticisms and consternation among his critics, mainly on the grounds that it is inimical to human welfare. G.A. Cohen, for example, one of the sternest critics, believes Nozick's account of justice commits him to the 'inhumane' view that "there is no more justice in a millionaire's giving a five dollar bill to a starving child than in his using it to light his cigar while that child dies in front of him" (1995: 31 n. 28). Cohen's criticism is virtually a duplication of Kai Nielsen's: "If this were the way we were to reason morally, it would entail that we not tax billionaires even the most modest sum to provide a milk subsidy at school for desperately impoverished, undernourished school children" (Nielsen 1985: 250). Nielsen therefore concludes that Nozick's libertarianism "is not fit for political theorizing or relevant to political reality" (Ibid. 250). In similar vein, J.D. Hodson, in indicting Nozick's entitlement theory, has this to say: "To say that someone faced with certain death must respect the property rights of someone who would lose nothing but a bit of property...seems an outrageous inversion of values" (Hodson 1977: 225). Samuel Scheffler joins the above-named detractors of Nozick in ridiculing the entitlement theory by averring that Nozick "would apparently judge it morally superior outcome if the cripples and orphans died than if the government tax its citizens to support them" (1982: 167). And Brian Barry wrote that Nozick "from the lofty heights of a professional chair, is proposing to starve or humiliate ten percent or so of his fellow citizens... by eliminating all transfer payments through the state, leaving the sick, the old, the disabled, the mothers with young children and no breadwinner, and so on, to the tender mercies of private charity" (1975: 331).[23] While these criticisms are not without some initial plausibility, I shall argue that, upon closer examination, Nozick's entitlement theory is not as insensitive to the poor as critics and Nozick himself would have us believe.[24] Indeed, it will be my thesis in Chapter four that his acceptance of the Lockean proviso clearly should commit him to saying that governments are justified in taxing the affluent members of civil society to alleviate the plight of the destitute.

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[22] That said, he seems uncertain over the issue of whether or not a legitimate property should be violated to save human life. He does not speak with a single voice: Sometimes, he asserts that a right to property is always absolute even when life is at stake, and at times he seems to be saying the exact opposite. For example, having argued that a right to life cannot trump a right to property, he goes on to explicitly mention in the footnote the possibility that deviations from the entitlement theory might have to occur in order to avoid moral horrors (See ASU: 30). However, he does not tell us what constitutes moral horror, nor does he tell us whether we are morally justified in violating rights to avoid moral tragedies. I will return to this contentious issue in Chapter 4.

Although Nozick candidly concedes that his entitlement theory is antagonistic to human welfare (ASU: ix), he maintains that it is the only theory that recognizes the fact that goods come encumbered with entitlements which ought to be preserved and respected. Thus, he thinks his entitlement theory is the only theory capable of treating the rights of individuals, at least under normal circumstances, as sacrosanct or inviolable. He insists that *all* patterned theories are unacceptable and objectionable because they require meddling in consensual economic interactions, and thereby inevitably involve the violation of people's rights to liberty and property. Nozick tries to inveigh against some major rival theories of the distribution of goods in order to pave the way for an easy endorsement of the conception of justice he favors. He proceeds by way of negation, unearthing flaws in some competing theories, thereby making his own position (more) compelling. For example, to enhance the plausibility of his own entitlement theory, he tries to undermine Rawls' theory of justice by subjecting Rawls' Difference Principle (DP) to a detailed analysis.

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[23] Mark Fowler has contended that Nozick's conception of justice is so politically and morally dangerous that his libertarianism should be dubbed "a framework for disaster" (1991: 255).

[24] Indeed, Nozick concedes that the harsh repercussions of his entitlement theory would land him in "some bad company" (ASU X). Jonathan Wolff is right in pointing out that "Nozick's own position is more complex than [his critics and Nozick himself assume]. We must address the question of why these people are starving" (Wolff 1991: 111).

Nozick classifies Rawls' theory as an end-state theory, contending that despite Rawls' overt denunciation of utilitarianism, his DP is not substantially different from utilitarianism as far as violation of rights is concerned. In a simplified formulation, Rawls' DP states that social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged in the society (Rawls, 1971: 60). The principle allows inequality of distribution of economic resources in society on condition that the inequality will better the position of the least well off in society. Put in a reverse, any distribution that does not favor those at the lower end of the distribution is unjust. Rawls' primary reason for endorsing redistribution of resources is familiar one, to wit, that people do not deserve their holdings and talents because they are arbitrary from the moral point of view. To be sure, he goes out his way to contend that even what people do to enhance or develop their natural talents has elements of external factors, such as heredity, social circumstances and affluent family, for which, once again, people deserve no credit.

> No one deserves his greater natural capacity nor merits a more favorable starting place in society... Perhaps some will think that the person with greater natural endowments deserves those assets and the superior character that made their development possible...This view, however, is surely incorrect. It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases (1971: 102-105).

From this passage, it is palpable that Rawls holds the view that people with natural assets deserve no special rewards since these are genetic endowments for which they are not responsible.[25] Nozick rightly takes Rawls' argument to imply that the DP is a principle of re-distribution which licenses governments to intervene in such a way as to ensure that inequality of distribution of economic resources in society always favors the least advantaged. Since Rawls' principle, in Nozick's interpretation, mandates redistribution of resources of the well to do, thereby considerably violating their liberty, it represents a "strong kind of patterned end-state principle" (ASU: 209). In other words, Nozick accuses Rawls of proposing a patterned theory, a theory that seeks to distribute the legitimate holdings of the affluent according to the pattern set by the Difference Principle. Nozick finds the justification behind the DP (namely, that holdings of the rich be distributed because the rich do not deserve their holdings, including their natural talents, because they are arbitrary from a moral point of view, in Rawls' slogan), incompatible with the principles of liberty and autonomy.[26] Consequently, he casts doubt upon Rawls' position as one of the proponents of Kantianism since, on Nozick's reading, Kant places much weight on human autonomy and personal responsibility:

> [Rawls's] line of argument can succeed in blocking the introduction of a person's autonomous choices and actions (and their results) only by attributing *everything* noteworthy about the person completely to certain sorts of "external" factors. So denigrating a person's autonomy and prime responsibility for his actions is a risky line to take for a theory that otherwise wishes to buttress the dignity and self respect of autonomous beings...one doubts that the unexalted picture of human beings Rawls' theory presupposes and rests upon can be made to fit together with the view of human dignity it is designed to lead to and embody (ASU: 214).

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[25] However, it is not clear if the Difference Principle would apply to those not born into privileged social groups, and not born with any special talents, but by their own choices and indefatigable efforts succeed in becoming wealthier than others.

[26] It should be noted that Nozick agrees with Rawls that the rich may not deserve their initial endowment packages or holdings. However, on Nozick's view, from the fact that a person does not deserve his/her holdings, in and of itself, does not give governments a right to redistribute the person's holdings. To use one of his memorable examples, although we never did anything to deserve our eyeballs, we are entitled to them nonetheless. In short, "undeserved holding" doesn't necessarily warrant redistribution.

Nozick holds that the DP, like the principle of utility, is incompatible with Kant's principles of liberty and human autonomy.[27] While Nozick overtly acknowledges that Rawls' theory is "undeniably great advance over utilitarianism" (ASU: 230), he insists that Rawls is as culpable as utilitarians in not taking the origin or history of resources of the rich into consideration and in not respecting the affluent's right to *absolute* property. Indeed, Peter Singer, though one of the ardent detractors of Nozick's libertarianism, has suggested that Rawls is *more* culpable than utilitarians in not respecting the right of individuals. For Singer, under the principle of utility, unlike the difference principle, everyone counts as one. As he puts it:

> The maximin rule treats the better-off as a means to the welfare of the worst-off. Indeed, one could say (though Nozick does not) that the tendency to treat people as a means to another's end is greater under the maximin rule than under utilitarianism, since a utilitarian would give *equal* consideration to everyone's interests, whereas the maximin rule forbids giving *any* consideration to the interests of the better-off, allotting them goods solely in so far as doing so assists the worse-off" (Singer, in Paul 1982: 48).

While Nozick and Singer are absolutely correct in their assumption that the difference principle makes the legitimacy of unequal benefits of the better-off contingent upon the maximization of the welfare of the worse-off group in society, one might say, contrary to Nozick, that Rawls' theory is noticeably different from utilitarianism, and thus, contrary to Singer, less culpable than utilitarianism in violating rights. Indeed, one might say that Rawls' theory and the theory of utilitarianism have nothing in common as far as respect of liberty and rights are concerned. Rawls, like Nozick, but unlike utilitarians, places considerable value on liberty. That Rawls cherishes the value of liberty is evidenced in his insistence that the first principle, the Liberty Principle, is always lexically prior to the difference principle, stressing that liberty can only be restricted in the name of liberty, not for equality of resources or anything else: "The only reason for circumscribing basic liberties and making them less extensive is that otherwise they would interfere with another" (1971: 64). Rawls makes it clear that the first responsibility of government is to guarantee equal civil liberties for citizens, stressing that these liberties are so important that we cannot sacrifice them to increase economic well being. Against utilitarians, and congruent with libertarians, Rawls avers that violation of liberty *cannot* be "justified by, or compensated for, by greater social and economic advantages" (ibid: 61). Thus, since Rawls is empathic that we cannot sacrifice any particular individuals' liberties for the benefit of even the majority, one might say that Nozick's alignment of the DP with utilitarianism does not do justice to Rawls' argument.

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[27] I will argue extensively in Chapters three and four that Nozick's appeal to Kant in this context is not justified. Suffice it to say here that since Kant and most Kantians deny Nozick's claim that taxing the 'undeserved rich' constitutes violation of their liberty or autonomy, Nozick cannot consistently 'disqualify' Rawls from being a Kantian—on the grounds that his DP authorizes governments to tax the 'undeserved rich'. Indeed, as I aim to show in Chapter three, Kant's principle of autonomy can be invoked to justify taxation in general.

However, this would not convince Nozick and libertarians to recant their indictment that the DP is a patterned theory, and thereby would inevitably violate individual's rights and liberty. Libertarians might argue that the kind of liberty Rawls talks about is not the same as libertarians' conception of liberty. To be sure, Rawls' conception of liberty substantially differs from Nozick's. Rawls is concerned with *basic* liberties, such as freedom of speech, freedom to vote and the right to run for public office. He does not see liberty as something we inviolably posses as Nozick does. Nor does he define liberty in terms of property rights.[28] Rawls does not regard interference of property rights as always constituting a violation of our basic liberties. In Rawls' system, unlike in Nozick's, redistribution of resources does not necessarily diminish or affect our basic liberties. This being the case, even if Rawls gives the Liberty Principle priority over the Difference Principle, as long as the liberty principle is not, by necessity, antithetical to redistribution of resources, Nozick's contention that Rawls joins utilitarians in violating rights would still stand, If rights include absolute property rights.

Rawls might make further effort to distance himself from utilitarians or patterned theorists by spelling out some fundamental differences between the DP and the principle of utility. For example, he might contend that his difference principle is emphatic on the economic improvement and concern of the poor. The principle, he would remind us, *always* seeks to ameliorate the economic well being of those disadvantaged in society. The doctrine of utilitarianism, on the other hand, supports whatever promotes the general utility. Thus, Rawls might stress, the doctrine of utilitarianism, unlike his difference principle, may require the poor to sacrifice something for the *already* rich. It is therefore conceivable that under utilitarianism, the poor might become poorer, while the rich richer.[29] Consequently, a Rawlsian might conclude that Nozick's indictment that Rawls is guilty of much the same crime as utilitarians stems from his misconception of Rawls' theory.

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[28] As a matter of fact, the right to hold property is conspicuously absent from Rawls' lists of basic liberties listed on pages 197 and 201. And on page 61, where he includes personal property, the word "personal' is in brackets, given the impression that he does not intend the right of property to be absolute. Put it differently, Rawls's theory of justice does not make morality solely a matter of negative rights. In contrast, Nozick contends that morality has the form of side-constraints on behavior, and that the scope of these constraints leaves little, if any, room for other enforceable moral rules.

Presumably, Nozick would not count this otherwise crucial difference between Rawls and utilitarians as particularly pertinent. I suspect he would say that Rawls goes just as far wrong in the opposite direction by proposing a theory that is inherently biased against the rich and in favor of the poor. Nozick's argument against Rawls can, I think, be made stronger or more plausible by emphasizing that in Rawls' theory, it does not matter exactly which particular members of the "least well-off" class benefit from inequality of resources. More significantly, when goods are redistributed to meet the requirements of the difference principle, it does not really matter which particular persons transfer certain property, and how and from whom they are acquired. In short, Rawls, congruent with utilitarians, is not concerned with who gets what. That is, Rawls inadvertently joins utilitarians in putting no weight on who produced the goods being distributed. Both are merely concerned with the structure of the distribution, to use Nozick's phraseology. So interpreted, Rawls joins the utilitarians in violating the entitlement theory, a theory, from Nozick's point of view, sustained by natural rights. In a nutshell, since the DP prescribes a distribution without putting any weight on who produced the goods being distributed, Nozick believes Rawls' DP, like utilitarianism, does not treat the rights of the affluent as inviolable. Thus, the DP, from Nozick's perspective, deserves the label "pattern."

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[29] Some utilitarians, including Hare, have reacted to this criticism by contending that the poor starving to death is likely to derive more utility from a piece of food than someone who is already well furnished with food. Thus, they have provokingly dismissed the claim that the principle of utility can aggravate the already deplorable condition of the poor as unrealistic (Goodin 1995: 23, Hare 1978: 124-6). However, since utilitarians cannot rule out the possibility that the already rich may get more utility from a piece of food than the starving poor, they still seem vulnerable to the above criticism.

Nozick's contention against Rawls' theory clearly commits him to saying that any theory that violates the tenets of his entitlement theory qualifies to be ranked among patterned or end-state theories. Rawls' DP, without a doubt, could be made to cohere with even extreme capitalism. This is so because Rawls contends that "the most extreme disparities in wealth and income are allowed provided that the expectations of the least fortunate are raised in the slightest degree" (1971: 157).[30] Indeed, one might argue that since inequality in society is necessary in order to fulfill Rawls' DP, Rawls cannot consistently argue in favor of strict equality of holdings. However, as long as Rawls' theory, in principle, could violate the entitlement theory, from Nozick's perspective, the DP is patterned; it is patterned because it could violate people's property rights.

If this analysis is correct, then one might say that Nozick employs his entitlement theory to legitimate *absolute* (property) right. Nozick wants his entitlement theory and his "inviolability" thesis to go hand in hand, with a violation of one implying a violation of the other. With this understanding, *to be a patterned theorist is simply to be a right violator*. Thus, following the logic of Nozick's own argument, I shall characterize patterned or end-state theories in terms of right-violations. I take this characterization to be crucially important since whether Nozick ultimately succeeds in defending his entitlement theory and arguing against taxation and welfare states, I believe, depends on whether he succeeds in preserving his "inviolability thesis." My thesis will be that Nozick's system, contrary to his apparently 'absolutist' assertions, admits of right violation; consequently, consistency demands that we classify him, along with Rawls, among patterned theorists. However, before I defend this thesis, I will briefly address the relation of Nozick's later writings to his endorsement of libertarianism in ASU.

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[30] It should be noted, however, that while Rawls would not condemn such a society, he would classify such a society as far from perfectly just. This is so because Rawls's vision of the ideal state seems to be deeply egalitarian in spirit.

Chapter 2

Nozick Contra Nozick: ASU vs. Post-ASU

Introduction

This chapter briefly examines the reasons that have led most commentators to conclude that Nozick's thought took directions inconsistent with the version of libertarianism in ASU, in which only negative rights (or the 'ethic of respect', as he called it later) can be coercively enforced by the State. In subsequent chapters, I will contend that while detractors of Nozick are right that some of his central claims in his later writings exemplify his philosophical switch from libertarianism to non-libertarianism, his switch clandestinely begins in ASU, where he purportedly defends libertarianism. Or, to be more exact, I will try to show that his political writings, including ASU and *Invariances*, are inconsistent with fundamental values that underlie libertarianism. If the argument I propose to develop proves successful, then a libertarian inspired by Nozick should be wary and skeptical not only about his post-ASU political writings but about his political writings in general, including ASU. That said, the task of the present chapter will be confined to exposing some apparently troubling incoherencies in Nozick's political *oeuvre*.

Some Apparently Deep Incoherencies in Nozick's *oeuvre*

As we saw in Chapter one, Nozick's political theory, as promulgated in ASU, is radically individualistic and highly atomistic in character. The individual, so conceived, is simply the psychological correlate of this atomistic view. To be sure, his state of nature, as we shall soon see, is one in which people are somehow disconnected from one another, such that they are predominantly self interested. The utility profiles of people in the state of nature are characterized by desires for goods that promote the individual's welfare, as distinct from self-sacrificial desires or desires for the welfare of others.

While Nozick does not invoke the social contract idea to explain and justify the moral legitimacy of his minimal state, he follows in the footsteps of Locke, his alleged libertarian progenitor, in contending that the state is simply an external or artificial unity. Like the classical libertarian theorists before him, Nozick begins his theory with individuals existing in pre-political states of nature (ASU: 6). While not strictly pre-social (*contra* Hobbes), Nozick's state of nature is by definition apolitical and ahistorical. The apolitical nature of Nozick's libertarian framework is obviously meant to buttress the ontological and conceptual priority of the individual over the state. Nozick believes his extreme individualist account of state of nature justifies only a minimal or night-watchman state devoted exclusively to protecting the property rights of citizens against both internal and external aggression. Nozick's radical individualism leads him to repeatedly maintain, against egalitarians, that the state lacks the moral authority to undertake the redistribution of wealth to alleviate material disparity. Nozick's individualism is epitomized by his insistence that there "are distinct individuals, each with his own life to lead" (ASU: 34). Accordingly, in keeping with other 'atomistic' libertarians, Nozick insists in ASU that any plausible theory of justice must emphasize the moral importance of the separateness of persons by treating the rights of individuals as virtually sacrosanct or inviolable.

Nozick's libertarianism in general, and his entitlement theory specifically, runs afoul of the tenets of democracy; in ASU, he explicitly and vehemently dismisses unrestrained democracy as a form of slavery. I will reserve any rigorous analysis of Nozick's general argument against democracy until Chapter 5. Suffice it to say that the entire Chapter 9 of ASU, under the rubric *demoktesis*, is devoted to showing the incompatibility of democracy with libertarianism. The import of his just-so story about *demoktesis* is that democracy would be justifiable *if and only if* all citizens incredibly sold shares in themselves to others and these shares became equally distributed over the population. However, since it is impossible to sell shares in all citizens in a way that everyone ends up with a share in everyone else, in Nozick's eyes democracy cannot be legitimate. Put otherwise: as long as democracy permits rights restrictions, individual rational citizens of his minimal state would have every reason to dismiss it as unjustifiably coercive or as slavery.

In his later writings, however, Nozick appears to have a second thought about democracy. Indeed, as we shall see shortly, he seems to recant his earlier repudiation of democracy by reversing his atomistic conception of a person. More surprisingly, in his most recent and last book, *Invariances* (2001), where he adamantly insists that he has not ceased his allegiance to the libertarian view, his entitlement theory gets incorporated into a four-level moral structure, which he describes as follows:

> In *The Examined Life*, I distinguished the following levels or layers of ethics. The first layer is *the ethics of respect*, which corresponds to an (extended) ethics mandating cooperation to mutual benefit. Here there are rules and principles mandating respecting another (adult) person's life and autonomy, forbidding murder and enslavement, restricting interference with a person's domain of choice, and issuing in a more general set of (what have been termed negative) rights. The second layer is the *ethics of responsiveness*, which is based upon an underlying notion of the inherent value of (all) individuals. It mandates acting in a way that is responsive to people's value, enhancing and supporting it, and enabling it to flourish. The third layer is the *ethics of caring*, which ranges from concern and tenderness to deeper compassion and love. In its full development, this layer mandates nonharm, *ahimsa* and love to all people, perhaps to all living creatures; it often is motivated by religious feeling or by an identification with all living beings. The final layer, what I termed the *ethics of Light*, calls for being a vessel and vehicle of Light (in the special meaning I there gave to that term, which encompasses the dimensions of truth, beauty, goodness, and holiness.) Socrates, Buddha, and Jesus, along with various lesser-known *rishis*, *tzaddiks*, saints and sages point the way. These layers stand in intricate relations to one another. Each level is more basic than the next higher level (respect is more basic than responsiveness) and is the ground from which the higher layer grows. The higher layer is to be followed when it conflicts with the more basic one but only in accordance with a principle of minimal mutilation of the lower (2001: 280).

In short, Nozick explicitly distinguishes four sources of moral considerations, which could be truncated as follows:

1) *The Ethics of Respect*: This is the libertarian negative right. It always prohibits external, other-agent interference.
2) *The Ethics of Responsiveness*: This requires us to be responsive to the value of others. It counsels against being insensitive to the plight of others.
3) *The Ethics of Caring*: This counsels us to establish and maintain ties of concern, friendship, community, and love for humanity in general.
4) *The Ethics of Light*: This enjoins us to be a selfless vehicle of goodness, beauty and piety. The Ethics of Light is what one might roughly call the 'morality of supererogation.'

Nozick's four-level moral structure can be made to cohere with the tenets of libertarianism as long as the role of the government is limited to the protection of citizens' negative rights or what he now calls the ethics of respect for rights. As we have seen, and will see again later, in ASU, Nozick minces no words in repeatedly insisting that the state's coercive apparatus should be limited to enforcing peoples' negative rights. Indeed, Nozick's endorsement of this 'narrow' function of the state in ASU paved the way for his antipathy to democracy. In ASU, as we just saw, he was overtly disdainful of democracy for coercing the minority to comply with the wishes of the majority. Thus, Nozick's atomistic conception of a person in ASU is directly relevant to his critique of democracy: Since there "are distinct individuals, each with his own life to lead" (ASU: 34), individuals or the minority cannot sacrifice their good for the sake of any social union. In fact, Nozick goes so far as to deny the existence of "social entity" that requires individuals to bear some costs for the sake of the overall social good. He writes: "there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more" (ASU: 32-3). In short, since democracy requires the minority to bear some costs for the sake of the overall social good, Nozick invites us to dismiss democracy as unjustifiably coercive. In other words, given that democratic voting outcomes are not wholly rational and consensual, Nozick believes democracy and libertarianism are mutually exclusive.

Nozick's Apparent U-Turn: From Individualism/Libertarianism to "Socialism."

In his later writings, however, Nozick seems to endorse the tenets of democracy by denying his libertarian claim that the political realm is ontologically reducible to abstract individuals. Specifically, in his *Philosophical Explanations* (1981), Nozick explicitly rejects his 'individual atomism' in favor of the closest-continuer conception of personhood. Nozick defines the self in the "Closest Continuer Theory" of personal identity (1981: 29) as having a unity that is not atomic but rather multi-dimensional and weighted. The 'self' is seen as an internally regulated unity of needs, desires and relationships, whose identity is preserved at the level of its evolving unity. With his endorsement of the "Closest Continuer Theory" of identity, Nozick seems committed to saying that the ends of members in a community may be shared, in the sense that one might regard one's friends and their life goals as somehow constitutive of who one is. With the closest-continuer theory, contrary to his position in ASU, one could be related to others in social union, in such a way that harm to oneself could be justifiably outweighed by the benefit to the social union. The closest-continuer theory implies that it is possible, if not likely, for a person to derive his/her identity from a social union. It is in this context that Nozick later overtly acknowledges his fundamental mistake of ignoring the important role symbolic utility plays in our social and political lives: "The political philosophy in *Anarchy, State and Utopia* ignored the importance to us of joint and official serious symbolic statement and expression of our social ties and concern and hence (I have written) is inadequate" (1993: 32).[1] The general point that Nozick aims to establish is that the inclusion of symbolic utility within our calculation of decision value sometimes compels us to follow ethical principles contrary to our individualistic and egoistic ends. However, our lives will make real contact with the world in a manner that is both substantial and expressive of ourselves. As he puts it elsewhere: "Attempts to find meaning in life seek to transcend the limits of an individual life. The narrower the limits of a life, the less meaningful it is. The narrowest life consists of separated and disparate moments, having neither connection nor unity (1981: 594).

With his endorsement of the "Closest-Continuer Theory" of personal identity, Nozick now has the theoretical resources needed to acknowledge dimensions of personal identity such as participation in community, from the community of two lovers to that of a nation. In *The Examined Life*, particularly in his discussion of "Lover's Bond", Nozick uses the term 'we' to denote a community whose members' identity has been affected by the existence of community.[2] The self, by necessity, enters into various kinds of *we*-relations with others, ranging from a lover to a nation, from family members to colleagues. Nozick makes it clear that a person in a community or "we" as he calls it, is not free to unilaterally and arbitrarily abstract itself from such an entity (1989: 71). Nozick's atomistic conception of a person in ASU motivated him to pose this rhetorical and satirical question: "Why not... hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good?" (ASU: 32). With his post-ASU theory of 'we' identity, Nozick of post-ASU now has an intelligible answer to the question just posed by Nozick of ASU: it is imperative that persons bear some costs that benefits others because

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[1] It is interesting to note that while in *The Examined Life*, Nozick says that his libertarianism *seems* (seriously) inadequate (286-287), in *The Nature of Rationality*, he says it *is* inadequate. Given that he wrote *The Examined Life* before *The Nature of Rationality*, one might, without nitpicking, take the difference in language to mean that Nozick has become even *more* critical towards his libertarian views.

[2] I am indebted in this paragraph to Wes Cooper.

> To be part of a *we* involves having a new identity, an additional one. This does not mean that you no longer have any individual identity or that your sole identity is part of the *we*. However, the individual identity you did have will become altered. To have this new identity is to enter a certain psychological stance; and each party in the *we* has this stance toward the other (1989: 71-2).

Nozick now holds that while each of us, as individuals, is a self prior to entering into socially available "we" relationships, and thus has an identity before joining social relationships, an individual's survival is dependent upon the survival of the "we". As he puts it, "the intention in love is to form a we and to identify with it as an extended self, to identify one's fortunes in large part with its fortunes. A willingness to trade up, to destroy the very we you largely identify with, would then be a willingness to destroy your self in the form of your own extended self" (1989: 78). This suggests, in sharp reversal of his earlier libertarian position, that we can never contract into, or out of, society as autonomous abstract individuals. Indeed, Nozick's argument implies that we destroy our individuality by contracting out of society.

Some philosophers, notably Hegelians and Aristotelians, have dismissed Nozick's individualist account of the state of nature, with its corollary entitlement theory, in ASU as unintelligible. For them, to talk of the ontological priority of the individual to the community is to indulge in nonsensical metaphysics. Michael Sandel, for example, following Hegel, has famously contended that the notion of imaginary state of nature can never be invoked as a basis of any plausible political theory because the notion is wholly unintelligible. Indeed, Sandel goes so far as to say that the very notion of atomistic individuals in theoretical pre-political state of nature, *even* as a hypothetical alternative to society, is meaningless, if not nonsensical (Sandel: 1982).[3] Sandel casts doubt on the usefulness of the fictitious state of nature because, from his perspective, "we cannot be wholly unencumbered subjects of possession, individuated in advance and given prior to our ends" (Sandel, in Solomon and Murphy 1990: 142).[4]

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[3] Similarly, Bernard Williams has expressed skepticism about the feasibility of Nozick's state of nature argument: "there is ...a persistent doubt about whether the State of Nature can really be got off the ground without taking for granted conventions and institutions of a kind which the State of Nature does not itself provide" (Williams in Paul, p. 32).

With Nozick's post-ASU 'socialist' theory of personal identity, Nozick is no longer vulnerable to the above criticisms of 'communists' and/or 'socialists'. As we have seen, the Closest-Continuer Theory developed in the *Philosophical Explanations* (PE) now provides Nozick with a non-atomistic conception of personal identity. Nozick now appears to concur with his ASU detractors that the apolitical or individualistic nature of his libertarian framework is both implausible and unrealistic. For example, in a Chapter of *The Examined Life* (TEL) captioned 'The Zig Zag of Politics', Nozick explicitly expresses deep skepticism about the atomistic, and apolitical nature of his libertarian framework, as famously put forward in ASU. While he does not explicitly renounce his libertarianism altogether, it is clear that he rejects his atomistic conception in favor of a 'non-atomistic' conception of a person. He draws an analogy between the state and an organism, an analogy which appears to refute his dominant thesis in ASU that political authority can solely be justified within an individualist moral framework. With his use of the metaphor of "organic unity", (TEL: 92-94) Nozick now believes that the state cannot, and should not, be understood to exist ontologically as simply the sum of its atomistic parts. His state/organic unity analogy clearly suggests that the state must be interpreted as an internally related entity. Nozick's point seems to be that citizens are somehow responsible for shaping their society as more or less valuable. Anyhow, Nozick is apparently denying his libertarian claim that the political realm is ontologically reducible to abstract individuals. Given the essence of his analogy, it is not unreasonable to say that the later Nozick would concur with Sandel and other Hegelians that the allegory of the state of nature is too abstract and artificial a concept even to serve as a useful theoretical fiction. Since we are "concrete" human beings with social ties and connections, Nozick acknowledges, quite rightly, that his libertarianism, as defended in ASU, seems to be "seriously inadequate":

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[4] While Rawls is Sandel's primary target, his criticism could, and indeed should, be readily applied to all philosophers who subscribe to the concept of state of nature, with its core claim that individuals are both conceptually and ontologically prior to society. Sandel's argument is meant to castigate what he calls "deontological position". By this, he means any theory that places individuals over and above society. Thus, Hobbes, Locke, Kant, and Nozick (of ASU) are all vulnerable to Sandel's criticism.

> Because it did not fully knit the humane considerations and joint cooperative activities it left room for more closely into its fabric. It neglected the symbolic importance of an official political concern with issues or problems, as a way of marking their importance or urgency, and hence expressing, intensifying, channeling, encouraging, and validating our private actions and concerns toward them (Ibid. 286-7).

The above "democratic" sentiments expressed in TEL here, furthermore, are elaborated and strengthened in the decision value/symbolic utility account of rationality in *The Nature of Rationality* (TNOR). There, Nozick contends that there could be a genuine utility realized for the individual in renouncing a certain amount of expected utility. Nozick, contrary to his position in ASU, explicitly maintains that our actions, if motivated by a consideration of symbolic utility, will give expression to a larger meaning to which we all wish to give our support (TNOR: 32). In light of the intrinsic value of social tie, Nozick concedes that "a broader decision theory is needed…to incorporate such symbolic connections and to detail the new structuring these introduce" (Ibid. 32).

More significant and germane are the implications his theories of organic unity, symbolic utility and the Closest Continuer Theory of identity have for his libertarian political philosophy. All these post-ASU theories seem incompatible with his libertarian minimal state in general, and his Entitlement Theory in particular. By emphasizing the importance of symbolic utility and the organic nature of the state, Nozick appears to be dismissing the libertarian thesis that the state lacks the moral authority to engage in the redistribution of resources to help the needy. Indeed, he now concedes that the libertarian view of the purpose of government, as advocated in ASU, as protector and defender of negative rights, is unduly limited. "The libertarian view looked solely at the purpose of government, not at its *meaning*; hence, it took an unduly narrow view of purpose, too" (TEL: 288). In so conceiving of the purpose of government, the redistributivist implications appear manifest: the role of governments is no longer restricted to the protection of people's negative rights. Now, it is the purpose of the government to ensure that certain goals, including humane goals, are achieved, goals that he characterizes as 'higher moral goals' and spells out in the 4-layer structure. This clearly suggests that it is within the purview of governments to undertake the redistribution of wealth to ensure that certain democratically chosen goals are realized. Simply put, property right now ceases to be absolute or inviolable.

Furthermore, with Nozick's post-ASU theory of personal identity, Nozick can no longer sustain his all-out assault on the value of democracy. Indeed, his post-ASU 'non-atomistic' theory of personal identity would permit, if not require, members of a *we* to consent rationally to the will of the majority. As we have seen already, since such a democrat would belong to a *we* with other citizens, succumbing to the will of the majority would not amount to coercion. Indeed, Nozick implies that since democratic institutions bind us together, and symbolize our desired mutual relations, we should embrace them.

> We want our individual lives to express our conceptions of reality (and of responsiveness to that); so too we want the institutions demarcating our lives together to express and saliently symbolize our desired mutual relations. Democratic institutions and the liberties coordinate with them are not simply effective means toward controlling the powers of government and directing these toward matters of joint concern; they themselves express and symbolize, in a pointed and official way, our equal human dignity, our autonomy and powers of self-direction.... Within the operation of democratic institutions, too, we want expressions of the values that concern us and bind us together (TEL: 286).

Nozick's argument implies that in democratic institutions, where all citizens consider themselves as part of a single *we*, the minority would willingly succumb to the democratic outcomes of the majority. In other words, the act of voting may be regarded as expressing a *we*-relationship to others, a relationship by which the minority may be understood to welcome majority decisions as expressing *our* will. Consequently, the majority in a democratic election cannot be said to unjustifiably exercise its ownership over the minority, and thereby 'enslaving' the minority. Of course, it is conceivable that the minority will see itself as not belonging in a single *we* with the majority, thereby making any talk of universal consent of citizens impossible. However, arguably, the existence of the "non-we" minority cannot stop the "we" majority from pursuing a higher moral goal in democratic institutions.[5] To be sure, Nozick's post-ASU four-level moral structure makes provision for coercion of the "non-we" minority in order that the "we" of the majority might attain a higher moral goal. This coercion, according to Nozick, is justified as long as it is done in accordance with the principle of minimum mutilation. That is, provided it is done in such a way as to minimize the infringement of rights of the "non-we" minority. In his own words: "The layers are related by a principle of minimum mutilation: Follow the principles of respect, and when it is necessary to deviate from them in order to achieve responsiveness, do this in a way that involves the minimum volition or perturbation of the norms of respect" (TEL: 212). While this passage does not explicitly say anything about 'coercion', Nozick seems to imply that coercion of the "non-we" minority is sometimes 'necessary' in order that the "we" of the majority might attain a higher moral goal. In fact, in his *Invariances*, where he tries to burnish his libertarian credentials, he explicitly endorses the 4-layer structure of TEL, and, within it, raises the question of which layers can be mandatorily enforced[6].

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[5] That said, it should be mentioned that in the *Invariances* Nozick *seems* to hold that rights-infringements by a democratic majority are only okay when the voters constitute a "we". He does not mention this qualification in TEL and NoR. However, this qualification does not make him a hard-core libertarian. To begin with, the conditions for membership in this 'democratic' social entity are a bit murky and vague. More importantly, the whole idea of such a social entity would be anathema to the libertarian Nozick of ASU. As far as the Author of ASU is concerned, the minority's rights cannot be violated, even if they are benefited by "our getting our way".

I will argue shortly that the principle of minimum mutilation is inconsistent with libertarianism, thus Nozick's endorsement of the principle in *Invariances* makes him a non-libertarian, notwithstanding his claim to the contrary. The principle of mutilation, on the surface, radically contradicts Nozick's position in ASU, where he salutes the economic or atomic conception of personhood, according to which the relationship of democrats to each other must be the relationship of owners to sheer commodities.

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[6] However, in his *Invariances*, my guess is that Nozick would say that democratic majorities could only infringe upon rights provided the voters constituted a 'we'. Nozick is not clear at all on this important issue. However, even if he holds that democratic majorities could only violate rights unless the voters constituted a 'we', I think he will still be vulnerable to my indictment that his principle of minimal mutilation is inconsistent with the libertarian claim that individual 'negative' rights cannot be violated. To begin with, Nozick does not tell us about the scope of the 'we'. Also, he seems to hold that individuals could pursue higher moral goals by encroaching upon rights but with minimal mutilation. This claim appears to run afoul of his "Kantian side-constraints view" which emphasizes the absolute inviolability of rights. For example, the principle of minimal mutilation seems to permit animal rights activists to rescue an abused animal from its owner (sneaking into the backyard, maybe even wrestling the animal from the owner's hands as he is torturing it). (The example was suggested Wes Cooper). In short, even if democracies cannot coercively enforce higher moral goals because of non-we minorities, as long as the principle of minimal mutilation authorizes individuals to violate rights, though not outrageously, the principle is arguably incompatible with the libertarian political philosophy.

It is clear that Nozick's principle of minimum mutilation as well as his post-ASU commitment to democracy sit uncomfortably with the libertarian political philosophy he *explicitly* defended in ASU. Nozick's "individual atomism" in ASU leads him to reject democracy with its accompanied patterned theories in favor of his entitlement theory. The entitlement theory, from Nozick's perspective, is historical in the sense that it makes the justice of a given set of holdings depend exclusively on the history of those holdings, and not on the conformity of the outcome to a given pattern. The entitlement theory, so construed, "justifies bequests that cascade down the generations; he who bequeaths so chooses, and he who inherits is duly chosen."[7] In short, Nozick's entitlement theory clearly presupposes that individuals may freely dispose of their holdings even if this results in massively unequal distribution of income and opportunity. His historical entitlement theory, as we shall see in Chapter 5, paved way for him to dismiss 'involuntary' taxation as 'theft".

However, Nozick's post-ASU theory of personal identity clearly commits him to endorsing taxation. Indeed, in some of his post-ASU writings, he unambiguously argues in favor of taxation. For example, while in his *Philosophical Explanations* he still questions the legitimacy of research grants funded by taxation (PE 507: 523), in *The Examined Life* he explicitly defends mandatory taxation on the grounds that taxation constitutes society's "solemn marking and symbolic validation of the importance and centrality of… ties of concern and solidarity" (TEL: 289). He goes on to emphasize that the bonds of concern for others justify the general tax system (Ibid. 291). Indeed, Nozick appears to reverse his famous claim that taxation is theft across the board by proposing a pattern that justifies taxation of bequests. Nozick, in sharp contrast to his position in ASU, contends that allowing property owners to dispose of their assets to whomever they please will bring about extreme inequalities; these inequalities, he now thinks, could be unfair and even detrimental to others. He therefore proposes a "patterned" principle called the "subtraction rule" as a legitimate way of dealing with unfair inequalities brought about by bequests. His proposed inheritance tax is meant to "subtract from the possessions people can bequeath the value of what they themselves have received through bequests" (1989: 31). Nozick does not see the subtraction rule as constituting unjustified violation of rights on others' property. Nor does he see it as "theft". Rather, the subtraction rule, among other things, views bequests as "an expression of caring" and not as an unconditional or absolute entitlement. (ibid. 31)[8] In other words, Nozick's subtraction rule distinguishes between earned and unearned income in order to be responsive both to the bond of caring between the gift-giver and inheritor, and also to the requirement of fairness to future generations who would be adversely affected by unlimited bequests. In short, Nozick appears to recant his criticism of patterned theorists by explicitly accepting some patterning in order to avoid outcomes that are *unfair*.

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[7] I owe this expression to Wes Cooper.

Nozick's argument, if stretched logically, seems to lean towards the conclusion that any unearned income that results in extreme inequality in society is unfair. Thus, it is not unreasonable to say that his subtraction rule about bequests would justify taxation aimed at mitigating unfair inequalities brought about by underserved income. Indeed, we might go further to say that since inheritance of income is not the only source of unmitigated inequality in society, the subtraction rule could be invoked to justify taxation on *all* unearned income, especially when—besides reducing the level of inequality —the taxation allows for the expression of caring. In short, Nozick's treatment of bequest in *The Examined Life* seems to justify taxation on both material inheritance and what one might call 'non-material biological inheritance'. Let me illustrate this: Consider a 'naturally' beautiful couple who gave birth to an extremely beautiful daughter, call her Miss Beauty. As a result of Miss Beauty's 'inherited' beauty, when she turns 18 she gets hired as a fashion model and is remunerated with millions of dollars each year. As if this is not good enough, Miss Beauty's 'inherited' beauty enables her to win Miss Universe effortlessly. The cumulative result is that Miss Beauty is now rich and famous. It is clear that Miss Beauty will gain an unearned advantage over the rest of her contemporaries, some of whom will be extremely poor as a result of their 'inherited' appalling looks from their parents—they can't get any decent job with a decent remuneration. If Nozick's inheritance law justifies taxation on undeserved inherited income, then it is only fair to extend the law to deal with unfair inequalities brought about by undeserved 'non-material biological inheritance'. Thus, arguably, Nozick's inheritance law would permit governments to tax Miss Beauty to compensate for others' bad 'ugly' look. To generalize this point, we might say that taxing all those who gain undeserved advantages over others by inheriting from their parents or relatives (a beautiful singing voice or keen intelligence or business acumen, and so on) is consistent with Nozick's inheritance law.[9]

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[8] Nozick goes as far as to suggest that the minimum wage laws might be construed as symbolizing our concern for the poor (TNOR: 27).

Nozick's inheritance law, so interpreted, brings him into surprising alliance with welfare liberals such as Rawls. As we saw in Chapter one, Rawls contends that people should not be rewarded for their native endowments because they have them only as a result of "the natural lottery" or "brute luck". Rawls insists that it is unfair for individuals to be disadvantaged or privileged by arbitrary and underserved differences in their social circumstances. With Nozick's new inheritance law, Nozick comes perilously close to concurring with Rawls that people with natural assets deserve not no be rewarded with huge returns, since they are genetic endowments for which they are not responsible. While Nozick's inheritance law does not commit him to endorsing Rawls' egalitarianism, he now seems to share with Rawls' sentiment that it is unfair to reward individuals with gigantic incomes for physical beauty, superior intelligence, or other native endowments, while others are wallowing in poverty. Predictably, Nozick would say that it is unfair because such a huge reward will bring about unjustified inequality. If my reading of Nozick's inheritance law has been on the right track, then one might say that Nozick of TEL would agree with Rawls that redistributing *inherited* wealth, which the inheritor did nothing to earn or acquire, to reduce unmitigated inequality is warranted. Indeed, given Nozick's new pro-democracy stance, we can confidently say that a democratic majority has the license to enforce the inheritance tax as "an expression of caring" for the poor, and as a means of reducing inordinate inequality. Thus, we are led to conclude that Nozick's new pro-democracy stance, his inheritance law, and of course, his post-ASU theories of personal identity undermine the fundamental tenets of libertarianism.

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[9] It might be replied that since the subtraction rule concerns only income that one did not earn oneself, not "undeserved" advantages generally, my criticism of Nozick is beside the point. While I acknowledge that Nozick's subtraction rule gives greater weight to claims of entitlement over earned rather than unearned income, I think his overall justification of inheritance laws seems to justify taxation even on 'earned' income. It should be remembered that Nozick cites unfair inequalities brought about by undeserved inequalities as one of the rationale for the subtraction rule. This being the case, he proposes the subtraction rule, among other things, to ensure that the future generations are not adversely affected by unlimited bequests. However, given that only few people inherit fortunes or 'unearned income' from others, one might say that limiting or applying the subtraction rule to only 'unearned income' might not achieve the desired result, namely, reducing unmitigated unfair inequality in society. If the subtraction rule, as Nozick tells us, permits democratic governments to 'implement' some 'patterning' in order to avoid outcomes that are unfair, then it is not unreasonable to extend the principle to mandate democratic governments to deal with inequalities brought about by both 'earned and unearned *undeserved*' income.

The 'Foundationlessness' of Rights Objection to ASU

While Nozickean rights can be said to be equivalent to Lockean rights, there is conspicuously no Lockean foundation in Nozick's theory of rights. In ASU, rights are simply intuited or postulated with no grounded theory of rights.[10] Locke famously argues for natural right on the basis of the fundamental law of nature. Nozick dismisses Locke's moral foundation as philosophically untenable, thereby distancing himself from Locke's natural law. Nozick puts it this way:

> Since considerations both of political philosophy and of explanatory political theory converge upon Locke's state of nature, we shall begin with that.... The completely accurate statement of the moral background, including the precise statement of the moral theory and its underlying basis, would require a full-scale presentation and is a task for another time. (A lifetime?) That task is so crucial, the gap left without its accomplishment so yawning, that it is only a minor comfort to note that we here are following a respectable tradition of Locke, who does not provide anything remotely resembling a satisfactory explanation of the status and basis of the law of nature in his Second Treatise (ASU: 9).[11]

Although Nozick does not explicitly offer any reason as to why he accepts the Lockean natural rights but rejects the Lockean natural law as the foundation of his theory of rights, it does not require too much ingenuity to figure out the reason: Locke's natural law is said to hinge on a theology in which Nozick does not show any interest. More importantly, the natural law carries with it the "theological" thesis that we are obliged to preserve ourselves as well as the rest of mankind.[12] In other words,

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[10] As we shall see momentarily, in his recent book, *Invariances*, Nozick indirectly attempts to provide the moral basis for his libertarianism.

[11] Given that Nozick makes use of some fundamental Lockean ideas — the state of nature, the proviso on acquisition, and the notion of liberty and natural rights — some scholars have rightly averred that Nozick's statement is misleading and wholly unfair to Locke (Hailwood 1996: 50, Wolff 1991: 27).

[12] Another reason that should be mentioned, a more positive one, is that by the time of *Invariances*, Nozick sees Lockean rights as an evolutionary emergence from mutually beneficial cooperation

Locke's natural law has the presupposition that the poor have moral and legal enforceable claims to assistance from the rich. The natural law, so construed, would obviously undercut both Nozick's intransigent stance on paternalism, according to which I may choose to destroy myself, and his Entitlement Theory, according to which there is no demand whatsoever on us to use our property to preserve the lives of others- barring some situations in which the Lockean proviso is brought into play. I discuss the Lockean proviso in Chapter four. In short, since the natural law *inherently* generates positive rights to survive, Nozick cannot logically and consistently claim a Lockean basis for his view of natural rights.[13]

In ASU, Nozick does not purport to provide any alternative moral and epistemological foundations upon which individual rights are erected. Indeed, he candidly concedes that his book contains no full-scale presentation of the moral basis for his views on rights (ASU: xiv). He reiterates this in one of his later writings: "In *Anarchy State and Utopia*, I presented a political philosophy based upon a certain view of the content of rights but did not (as I said there) present any moral foundation for that view" (PE: 498). Some commentators have justifiably taken this concession as a devastating criticism of his theory of rights, leading some to reject his entire enterprise as manifestly indefensible and implausible. Peter Singer, for example, has contended that the lack of moral basis of individual rights in Nozick's theory renders his libertarianism indefensible. Singer goes on to write that the moral foundation of rights is so crucial "to [Nozick's] whole enterprise that publishing the book without it shows considerable effrontery, like building a splendid skyscraper, complete with revolving rooftop restaurant, without solving the engineering problems that determine whether the building will stand up" (Singer, 1996: 191). Similarly, Thomas Nagel, one of the harshest critics of Nozick, has devoted his entire article, "Libertarianism Without Foundations", to denouncing Nozick's "foundationless" libertarian theory of rights.

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stretching back to our hunter-gatherer ancestors and indeed to simple organisms. This is his 'genealogy' of morals.

[13] However, I will argue later at length that since the Lockean natural right and the natural law are inextricably linked, it is impossible to embrace the former and repudiate the latter at the same time.

It should be noted that even some libertarians who are sympathetic to Nozick's general libertarian ideas have joined detractors in dismissing Nozick's 'foundationless' libertarianism as implausible. For example, Loren Lomasky, a libertarian himself and an admirer of Nozick, concurs with detractors that the lack of moral basis in Nozick's theory of rights robs his libertarianism of its plausibility. In Lomasky's estimation, "rights without foundation are treacherous entities" (1987: vii). While a libertarian Narveson essentially agrees with Nozick that individuals are entitled to their legitimate holdings, he tries to distance himself from Nozick's "foundationless libertarianism." Indeed, Narveson vehemently criticizes Nozick for grounding his otherwise plausible libertarian theory on sheer moral intuitions. Narveson dismisses Nozick's "intuitional" libertarianism' as indefensible because the "adoption of the intuitional method virtually precludes rational issue; it simple continues to burn" (1988: 109). Chapters 9 and 10 of Narveson's book, *The Libertarian Idea* (1988), are devoted to salvaging libertarianism from the apparently troubling criticisms of Nozick by providing 'rational' or contractarian, as opposed to 'intuitional', foundations. Drawing on the work of David Gauthier, Narveson devotes the bulk of his book to providing a contractarian justification of libertarian ethics in which rights of liberty and property are established on principles to which rational agents would agree under fair bargaining conditions.

However, in defense of Nozick's position in ASU, it has been asserted that it is unfair to dismiss Nozick's argument as implausible on the grounds of its lack of moral foundation. Since, the argument goes, "Nozick is operating within the pregiven tradition of American political philosophy…it is perfectly appropriate for him to automatically accept American political values since those are the context of his work."[14] In the same way, Kai Nielsen, though an ardent critic of Nozick, concedes that Nozick's "conception of individual property is a very distinctive western style conception of ownership. …This conception of full capitalist property rights is unique to our culture…. Given this situation, it is indeed not unreasonable to suspect that Nozick's view of property and ownership is very ethnocentric" (1985: 252).

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[14] One of the anonymous reviewers of ASU has resorted to this line of defense. See: *http://www.wkonline.com/a/Anarchy_State_and_Utopia_0465097200.htm*

While this "cultural" reading of Nozick appears to have the merit of explaining the lack of moral foundation of rights upon which his libertarian theory rests, I do not think Nozick would be happy with such a reading. To start with, such a reading would seriously commit Nozick to saying that only "westerners" or better still "capitalists" possess (natural) rights, a commitment which palpably runs afoul of his central and repeated claim that *all* individuals have rights (ASU: ix). Since Nozick does not believe that human rights are a "western" or "capitalist" construct, he would presumably reject any ethnocentric or 'cultural' reading of his libertarian theory of rights. Nozick's famous claim that all individuals have rights commits him to holding that there are universal civil and human rights. As I will contend in Chapter three, Nozickean rights are best interpreted as claim-rights *in rem*: "rights against the *whole* world", and rights *all* persons have in virtue of being persons. Nozick embraces the Lockean conception of natural rights as claims against others that *all human beings* are entitled to respect. Accordingly, the indictment that the lack of moral basis of rights in Nozick's theory renders his libertarianism in ASU incomplete, if not implausible, should be made to stand.

Invariances: An Attempt at Providing Libertarianism with Foundations

In his last book, *Invariances,* Nozick is sensitive to the criticism that his libertarian theory of rights is 'without foundations'. He therefore tries to outline the basis for a moral theory in order to fill the conspicuously 'foundationless' lacuna in ASU. Specifically, he makes the effort to provide the moral basis for his libertarianism by maintaining that the "core principle" of libertarian ethics "makes mandatory the widest voluntary cooperation to mutual benefit; it makes only that mandatory" (2001: 259). In response to his own question why every human society has developed some sort of morality, Nozick answers that our moral capacities have been selected for by evolution, for the purpose of coordinating our actions in order to achieve mutually advantageous goals or benefit. In short, Nozick now grounds the ethic of respect in the core of ethics, mutually beneficial cooperation. This "core" of ethics is hypothesized as emerging by natural selection, as groups that constrained their behavior towards each other were better able to survive and reproduce. Thus, Nozick seems to be saying with contractarian libertarians that if we adhered to the libertarian non-aggression axiom[15], we would be able to pursue our own ends and goals without any unjustifiable interference. It is the conviction of Nozick that natural selection has imbued us with the capacity to follow ethical norms that will bring about mutual benefit and cooperation.

Although Nozick does not directly use the contractarian approach to derive the fundamental moral rules, the evolutionary functions of ethics that he spells out in his *Invariances* bears a striking resemblance to Narveson's social contract libertarian argument. Indeed, Nozick now appears to join Narveson in emphasizing the mutual benefits of being guided by the libertarian non-aggression axiom.[16] As Nozick astutely puts it “we each adhere to noninterference, refraining from murdering, enslaving or stealing from the other. More likely, this involves an exchange: I exchange my refraining for your refraining, and I will refrain only provided that, and only as long as, you continue to refrain, only so long as you do not take steps (or make an attempt) to interfere (2001: 245). In short, Nozick of *Invariances* would concur with a contractarian Narveson that we would all be better off if we all respected other peoples' rights and liberty.

Nozick's new ‘evolutionary’ foundation of rights, as described above, appears to exonerate him from Nagel's famous indictment that his libertarianism is without foundation. We can see chapter 5 of his *Invariances*, “The Genealogy of Ethics”, as a response to numerous detractors who have dismissed his theory as implausible on the grounds of its lack of moral foundation. Similarly, by invoking the theory of evolution to account for the function of ethics, Nozick now seems to escape the criticism of his fellow libertarians, namely, that his libertarianism is incapable of explaining the origin of rights. Narveson, in particular, as we saw earlier, contends that since natural rights do not “grow on trees”, Nozick owes us an explanation as regards the origin of rights. Nozick's contention that natural selection has instilled us with rights and the capacity to respect other peoples' rights for our mutual advantage seems to take care of Narveson's otherwise devastating criticism. Indeed, in his recent interview with Peter Jaworski, Narveson overtly admires Nozick's effort to ground the ethics of respect (the libertarian negative rights) in mutual advantage.[17] In fact, in response to an interviewer inquiring whether he had a "concluding thought about Nozick that may be relevant to our readers" he answered:

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[15] The non-aggression axiom simply states that it is permissible for a person to do anything s/he wants as long as s/he does not initiate or threaten invasive violence against others or legitimately owned property of others. The non-aggression axiom is said to be the lynchpin of libertarianism.

[16] I used the word “appears” because Nozick might distance himself from contractarians by saying that we have been selected by the invisible hand for Respect for Rights, without a contract.

> By all means, read the Ethics chapter of his last book, *Invariances*. This is his best work on moral philosophy. It is more theoretical, in a sense, than *A, S &U* and much more penetrating, especially as regards the most significant failing of the earlier book, namely the lack of a real discussion of the foundations of ethics" (Ibid).[18]

In saluting Nozick's *Invariances* for removing ASU's 'failing', Narveson is obviously retracting his earlier 'foundationless' criticism of Nozick. In fact, in this interview, Narveson goes on to acknowledge a striking resemblance between his own libertarianism and Nozick's libertarianism in *Invariances*.

While Nozick's identification of coordination activity for mutual benefit as the evolutionary source and function of ethics brings his libertarianism (more) into line with Narveson's, he is careful not to collapse his genealogical account of morality into contractarians' justificatory account of morality. He explicitly distinguishes his genealogical project from Gauthier's/Narveson's justificatory accounts. He writes:

> Unlike Gauthier's, the account of ethics in this book [*Invariances*] does not take cooperation to be mutual advantage to be the whole of ethics, but it includes other layers of ethics as well; it offers a genealogical rather than a justificatory account; and it does not propose one particular rule of dividing benefits either as normatively or as descriptively correct (2001: 393, fn. 34).

In other words, Nozick's genealogical accounts of ethics is different from the contractarians' justificatory accounts because he, unlike Gauthier and Narveson distinguishes three sources of moral considerations *in addition to* those comprising the Ethic of Respect.[19] Since Gauthier and Narveson take cooperation to mutual advantage (what Nozick calls the Ethic of Respect in *Invariances*) to be the whole of ethics, presumably Nozick would dismiss their 'justificatory' project as woefully inadequate. Nozick's project, in my estimation, is more plausible than Narveson's/Gauthier's. To support this claim, let us briefly compare and contrast Gauthier's/Narveson's theory of rationality and Nozick's genealogical account.

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[17] See http://www.peterjaworski.com/Jan

[18] Not all libertarians share Narveson's positive assessment of Nozick's book. For example, libertarian Edward Feser, an admirer of ASU, in my private correspondence with him wrote this: "For what it's worth, I don't myself think that what he says in *Invariances* is very good. I think he should have stayed with self-ownership and natural rights and never gotten into all the contractarian and evolutionary psychology stuff."

In *Morals by Agreement* (1986), Gauthier proposes a theory of rationality, which he calls "constrained maximization", according to which all rational agents who primarily seek to pursue their own interests will be voluntarily disposed to comply with mutually advantageous moral constraints on their choices, as long as they expect the same compliance from others (1986: 78). Gauthier calls the rational individuals who morally bind themselves "constrained maximizers", as opposed to "straightforward maximizers", that is, individuals who do not accept any constraint on their choices and actions. Constrained maximizers usually seek to maximize their own expected utility, but they are willing to forgo a maximizing action in favor of cooperative ones. Gauthier's maximizing rationalist justification of morality begins from one's commitment to promote one's ends, and argues that one can best serve one's interest if one is moral. As he puts it, "we pay a heavy price, if we are indeed creatures who rationally accept no internal constraint on the pursuit of our own utility" (Ibid: 164). Thus, for Gauthier, as for Kant, there is a correlation between rationality and morality.[20]

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[19] While Nozick specifically contrasts his genealogical project with Gauthier's justificatory accounts, the contrast applies to Narveson as well, since Narveson believes his contractarian libertarian position is derived from Gauthier's. Though a Hobbesian, Narveson does not share Hobbes' sovereign solution to social problems. Rather, drawing on the work on David Gauthier, Narveson contends that since rational individuals are capable of solving their own social problems, Hobbes' sovereign or the Leviathan is unnecessary, if not dangerous (Narveson 1988: 139-140). In short, Narveson defends his Hobbesian contractarianism minus Hobbes' sovereign by building on the work of David Gauthier. Narveson is hopeful that the political implications of Gauthier's moral theory are highly congenial to his libertarianism.

[20] It is interesting to note that both Kant and Gauthier claim that it is rational to follow the commands of morality. That is, on both accounts, to act rationally is to act morally, and vice versa. However, they fundamentally disagree on what it means to say one is rational. Whereas Kant contends that rationality commits us to morality, no matter what our interests and sentiments, Gauthier identifies rationality with maximization of utility. Another way of putting this is that whereas Gauthier regards morality as a means to an end, Kant regards morality as an end in itself.

Narveson agrees with Gauthier that one can best satisfy one's preferences if one adopts constrained maximization as one's conception of rational action. Since constrained maximizers will cooperate with their fellow constrained maximizers knowing that their rights to liberty, property and life will always be respected, they would live in peaceful cooperation with their constrained maximizing neighbors. Thus, Narveson concludes that Gauthier's contractarian theory aptly provides the ethical basis for libertarianism.[21] Both Narveson and Gauthier maintain that moral constraints are artificial, resting on mutually advantageous conventions. In a nutshell, both take cooperation to mutual advantage to be the whole of ethics.

Gauthier's and Narveson's contractarian justificatory account of morality has met a myriad of criticisms. To start with, their justificatory project seems to commit them to holding the implausible view that morality demands that we confine our obligations to only beings with whom we can engage in mutually advantageous relations. Since Gauthier and Narveson reject the inherent moral status of persons with its corresponding 'natural duty', they are further committed to holding that there is nothing intrinsically "right" or "wrong" about one's action, even if it involves harming others. Indeed, Gauthier has tacitly acknowledged that his mutual advantage contractarianism implies that the congenitally infirm 'fall beyond the pale' of justice (Gauthier 1986: 268). The mutual advantage theories, so construed, may render all young children vulnerable since "there is little the child can do to retaliate against those jeopardizing its well-being" (Lomasky 1987: 161).[22]

Some mutual advantage theorists have denied that their theory has the above, counterintuitive implications. Here I have in mind Narveson, who overtly denies that all persons are naturally entitled to equal consideration, yet insists that his contractarian libertarian philosophy does not commit him to the implausible claim that people would have no reason to respect the rights and liberty of others. According to Narveson, while violating the liberty and property of others is not inherently wrong, each person will benefit tremendously in the long run by agreeing to mutually advantageous agreements that constrain people from violating rights. Similarly, although there is nothing intrinsically wrong in killing innocent people, we would be better off accepting conventions that define murder as wrong and unjust. Thus, Narveson concludes that his contractarian libertarianism, which stresses that we voluntarily respect each others' lives, liberty and property, adequately provides the moral standard necessary for a civil society.

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[21] It should be noted, however, that Narveson disagrees with Gauthier on some important issues. For example, he rejects Gauthier's assertion that the initial bargaining position should be constrained by the Lockean Proviso. Indeed, he dismisses the entire Lockean Proviso as incompatible with libertarianism. I discuss the Lockean Proviso and Narveson's criticism of it in Chapter 4.

[22] Given this obviously counterintuitive implication of mutual advantage theory, one might say, with L. W. Sumner, "why we should regard it as a method of moral justification remains utterly mysterious" (Sumner 1987: 158).

Although Narveson's argument has some superficial plausibility, his effort to make his mutual theory advantage cohere with morality, as understood traditionally, is dubious at best. It should be noted that for mutual advantage theorists, including Narveson, whether it is advantageous to adhere to a particular convention is always contingent upon one's preferences and powers (cf. Kymlicka 2002: 132). This being so, those who are naturally strong and talented will always do better than those who are naturally feeble, since the former have much bargaining power. This implies that those who are strong have little or nothing to gain from cooperation with the feeble and vulnerable: the strong can always appropriate the little produced by the weak and vulnerable without fear of future retaliation. What this suggests is that the strong are rationally justified in *not* extending their obligations to the weak and vulnerable. In other words, the obligation of the strong ends with only beings with whom they can always engage in mutually advantageous relations. The strong who act justly do not do so because they see justice as intrinsically valuable. Rather, they act justly "because they lack 'power irresistible' and so must settle for justice" (Ibid, 2002: 136). In a nutshell, the problem is that contractarians who take cooperation to mutual advantage to be the whole of ethics have no way of showing that the strong and powerful who benefit tremendously in the long run by ignoring their 'duty' to the poor and vulnerable commit an injustice against those 'neglected' vulnerable. Thus, Narveson woefully fails to salvage the mutual advantage theories from the above counterintuitive implications.

With Nozick's reaffirmation of the four-layer moral structure with its principle of Minimum Mutilation in his *Invariances*, he is not vulnerable to the objections faced by Gauthier and other mutual advantage theorists. While in

Invariances Nozick still regards the deontological ethic of individual rights defended in ASU as the functional 'core' or the fundamental layer, he inveighs against the claim that the libertarian ethic of respect for individual right is the whole truth about moral constraints and imperatives. Nozick maintains that there are "higher levels" of ethics which entreat each and every one to assist the needy *regardless of what they can do to or for us*. More specifically, the second layer, the ethic of responsiveness, requires us to respond to the plight of the poor by helping them out. As we saw earlier, the Ethic of Responsiveness permits some rights violations in accordance with the principle of "minimum mutilation" in order to respond adequately to some higher value. Thus, governments are justified in 'minimally' restricting property rights of the affluent by taxing them in order to be responsive to the value of the poor citizens. In short, the second layer justifies taxation since the gain in ethical responsiveness outweighs the cost of the ethic of respect. This suggests that taxation does not necessarily constitute "disrespect" to individuals, contrary to his position in ASU. The third layer, the Ethic of Caring, requires us to demonstrate deep affection and caring attitude towards humanity in general. The third layer, again congruent with the principle of minimum mutilation, permits us to pursue higher goals with as little damage as possible to the second layer. The fourth and final layer is the Ethic of Light. This is the ethic of saints and heroes; this layer is built upon the previous layers, and enjoins us to become a selfless vehicle of goodness. In short, Nozick's four-layer structure and its principle of minimum mutilation allows us to pursue higher moral goals than respect of rights, if we do so in such a way as to minimize the infringement of rights.

Nozick's incorporation of the four-layer structure into his system makes his position more plausible than Gauthier's and Narveson's: with his endorsement of the three sources of moral considerations in addition to those comprising the Ethic of Respect for rights, Nozick, unlike Narveson and Gauthier, has the theoretical resources needed to acknowledge that we have a duty to protect the vulnerable even if doing so would not be conducive to our own interest. Nozick succeeds where Narveson and Gauthier have failed. However, does Nozick's "success" come at the price of making him less libertarian? Asked differently: can Nozick consistently affirm the four-layer structure and affirm his libertarianism? The next section divulges an intractable tension between Nozick's desire to affirm the four-layer structure and his desire to affirm his libertarianism.

How Libertarian is Nozick of *Invariances*?

As pointed out earlier, in his last interview as well as in his last book, Nozick makes it clear that he has been a consistent libertarian all the way through. To be sure, one can find passages in his *Invariances* in which Nozick tries to reiterate his libertarian leanings. For example, he seems to re-endorse his earlier unmitigated libertarian views when he writes:

> The different levels of ethics have a different status. The ethics of respect, largely specified by what I have called the core principle [about mutual advantage], is the part, the *one* part (I think), that is (that should be) mandatory across all societies. In saying this, I am putting forward a particular normative position: that the further ethical levels are matters of personal choice or personal ideal. Even if these further levels are not mandatory for all societies, some particular society may attempt to make one or another of these further levels mandatory *within it*, punishing those members of the society who deviate or fall short. I also believe – this is an additional component of my own position, presented in *Anarchy, State, and Utopia* – that no society should take this further step. All that any society should (coercively) demand is adherence to the ethics of respect. The further levels should be matters for a person's own individual choice and development (INV 281-2).

Nozick's point is that since the norm of voluntary or unforced cooperation constitutes the core principle of ethics, the further levels are purely optional; that is, they are not mandatorily imposed. In other words, the deontological ethic of individual rights defended in ASU becomes the functional 'core' of ethics in *Invariances*. While he still concedes that there are "higher levels" of ethics which entreat each and every one to assist the needy, he, in keeping with his libertarian philosophy in ASU, maintains that we, including governments, must concern ourselves with the moral foundation "necessary to the functioning of nonviolent relations, so that rights of noninterference are what are to be most strongly mandated and enforced, thereby preserving room for people to pursue their own ends and goals" (ibid 282). We can reasonably infer from this passage that Nozick is trying to revisit his ASU *demoktesis* critique of democracy: Since *only* the Ethic of Respect or the libertarian individual right is binding on everyone, the minority who did not vote for taxation cannot justifiably be coerced into paying it. In short, given Nozick's unequivocal reaffirmation of his libertarianism in his last book, one might say that his status as a libertarian is indisputable.

On the other hand, even in his last book, *Invariances*, where he tries to remain true to his libertarian roots, there is a prima facie case that he is not averse to taxation and democracy. He unambiguously supports a Winner Take Proportional All model of representative democracy, (2001: 265-266) implying that democratic voting outcomes — including a vote to support taxation — could legitimately bind the minority[23]. While he tries to cling to his ASU critique of taxation and democracy by contending that "all that any society should (coercively) demand is adherence to the ethics of respect" (ibid: 281).[24] Nozick owes us an explanation as regards how this apparently anti-democratic view squares with his recommendation of a Winner Take Proportional All mechanism for representative democracy (ibid. 265-6). Indeed, given that democracy involves violation of rights of the minority by generating coercively enforced laws, one must say that Nozick's explicit endorsement of representative democracy cannot be made to cohere with his libertarian absolute theory of rights in ASU.

Nozick might try to dance around this puzzle by contending that because personal choice on his post-ASU account of personal identity can include choices to become part of a 'we', or at least to make choices that have the effect of one's becoming part of a 'we', his new commitment to democracy is not inconsistent with his general libertarian political philosophy. Admittedly, since Nozick insists that the higher levels are a matter of personal choice, individuals can freely choose to become part of the 'we', and thus democracy cannot be said to be intrinsically antipathetic to libertarianism. However, Nozick's 'personal choice' argument also implies that some people can freely choose *not* to become part of the "we". In such an instance, should the democratic majority impose their will on the minority 'non-we'? As reality has shown us, democratic voting outcomes are not consensual; it would be hopelessly unrealistic to suggest that libertarianism and democracy would always be easy bedfellows. Thus, it is fair to conclude that until Nozick rules out the possibility of divergent democratic voting outcomes, the indictment that his endorsement of democracy is incongruous with libertarianism remains valid.[25]

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[23] That said, Nozick does not explicitly say whether or not he endorses constitutional constraints on democracy. However, given his commitment to the Ethic of Respect, consistency would seem to debar him from going along with any old democratic decision to limit individual rights unjustifiably. Considering the emphasis he places on the Ethic of Respect, one might say that the *Invariances* version of democracy would be constrained by a strong rights-protecting constitution. It's a shame Nozick does not say more about this interpretive sore spot.

[24] When Nozick says no society "should" coercively demand such adherence, it isn't clear what normative force the "should" is supposed to have: Does he mean merely that it would be imprudent to do so? Does he mean society should never do it under any circumstances, or only that there should be a defeasible presumption against doing so? I will have more to say about this later.

Worse still, in his *Invariances*, where he reaffirms his status as a libertarian, he surprisingly continues to subscribe to his principle of Minimal Mutilation, a principle which, as we saw earlier, palpably presupposes that rights can be justifiably but 'minimally' violated. Nozick makes it crystal clear that: "the higher layer is to be followed when it conflicts with the more basic one but only in accordance with a principle of minimal mutilation of the lower" (ibid. 281). In other words, we may pursue higher moral goals than respect for rights, if we do so in such a way as to minimize the infringement of rights. In short, the principle of minimal mutilation seems to permit us to violate libertarian negative rights, although minimally so in accordance with the four-level structure in order to achieve a higher moral goal. In his own defense, Nozick might say that the acceptable level of mutilation will be set very low in a manner that prevents mandatory enforcement of higher layers. However, this line of defense cannot absolve Nozick of the criticism that his endorsement of the principle of minimum mutilation is inconsistent with his libertarian theory of absolute rights. For why else would he incorporate the principle of minimal mutilation into his system if he truly believed rights were absolute? While I acknowledge that the principle of minimum mutilation somehow respects rights by keeping curtailments of them to a minimum, it cannot be denied that the principle—together with the permission for societies to enforce their democratic decisions—undoubtedly authorizes democratic governments to coercively enforce curtailment of rights. Thus, it is not unfair to say that Nozick's principle of minimal mutilation commits him to retracting his almost 'absolutist' claim in ASU that "we either drink deep or we taste not".[26] In other words, his principle now seems to release us of the charge that "we either respect rights fully or we do wrong". It is not an "all-or-nothing" affair. Thus, I find this remark of Narveson quite surprising: "one thing is perfectly clear: in his last work, *Invariances*, he restates, very specifically, the libertarian view, and reaffirms it as resoundingly as in *A & S & U*"[27]. As long as Nozick continues to subscribe to democracy and the four-level moral structure and its principle of minimal mutilation, his protestation of fidelity to libertarianism in *Invariances* cannot be taken seriously. Combining this with his theoretical shifts in TOR, TEL, and PE, we can generalize the claim that the major ideas that Nozick developed Post-ASU lead away from the libertarian political philosophy.

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[25] Indeed, as we shall see in a moment, Nozick's principle of minimal mutilation implies that the autonomy of the individual can be reduced, enough to allow mandatory enforcement of higher moral goals *decided upon by a majority*. In other words, his principle allow for violation of rights, as long as the violation is not outrageous.

I realize that Nozick wants to judge his departures from libertarianism as a matter of degree. Indeed, his interview with Julian Sanchez does make it sound like he is claiming that he never changed his mind except in a relatively minor way: he says that his departures were exaggerated by his critics. In other words, he seems to believe that he is still a kind of libertarian even though his libertarianism had become more moderate. As a matter of fact, he explicitly says in the interview that he was "not as hardcore" a libertarian as he once had been, implying that he was *still* a libertarian, though a moderate one. Given this claim, one might say that I am unfairly judging his departures on an either-or basis.

However, as I have argued, since his non-atomistic conception of personal identity clearly commits him to endorsing redistributivism, one might wonder if Nozick of TEL, in particular, is a libertarian of *any* kind. In TEL, as we saw, Nozick surprisingly but explicitly dismisses as unduly limited the libertarian view of the purpose of government as protector and defender of negative rights, (TEL: 288) stressing that it is the purpose of the government to engage in redistribution to ensure that certain 'higher moral goals' are achieved. Also, in the same book, he overtly argues in favor of taxation or 'patterning' in order to avoid outcomes that are unfair. In short, given Nozick's unequivocal endorsement of redistributive taxation, one might justifiably question the distinctiveness of his so-called "moderate" libertarianism from liberal welfarism. We may genuinely wonder whether this 'moderate' version of libertarianism is really a distinct alternative to existing forms of liberal 'welfarism'. To be sure, one might wonder why welfare liberals should bother with Nozick's post-ASU moderate libertarianism at all, if his views converge on liberal welfarism. I will go further to suggest that since Nozick's 'moderate libertarianism' fails to distinguish itself from liberal welfarism, if Nozick of TEL 'deserves' the name 'libertarian', then Rawls and other welfarists might as well be called libertarians. Given his explicit endorsement of redistributivism in TEL, one might say that with enemies like Nozick, welfare liberals do not need friends.

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[26] One might say that my claim that Nozick's principle of minimal mutilation commits him to retracting his almost 'absolutism' in ASU contradicts my earlier point in the previous Chapter that ASU is 'implicitly' redistributive. However, it should be noted that it is the Nozick of ASU who sees himself as an "absolutist". Indeed, he concedes that his 'absolutist entitlement theory' would land him in "some bad company" (ASU X). And as we saw in Chapter one, his entire argument against Rawls implies that Rawls is not an absolutist enough to be ranked among Kantians. My thesis is that even Nozick of ASU is not an 'absolutist' as he would make us believe. Thus, his endorsement of the principle of minimal mutilation is consistent with my non-absolutist reading of him in ASU.

[27] He made this remark in his interview with P.M. Jaworski: http://www.peterjaworski.com/Jan. While my general contention will be that both Nozick of ASU and Nozick of Invariances are not hardcore libertarians, against Narveson, I will maintain that, at least, the former is more superficially libertarian than the former. To be sure the author of ASU would dismiss the four-layer moral structure and its principle of mutilation (which the author of *Invariances* unquestionably embraces) as incompatible with libertarianism.

Consequently, it comes as no surprise that some philosophers have concluded that Nozick's thought took directions incongruous with the version of libertarianism in ASU, in which rights cannot be violated with justification. Indeed, some scholars have gone as far as to conclude that his later writings exemplify his philosophical switch from libertarianism to socialism, if not communitarianism (Lacey 2001: 98, Wolff 1991: 32).[28] It is worth mentioning that even some prominent libertarians regard his post-ASU views non-libertarian. Edward Feser, for example, maintains that what Nozick said in his post-ASU writings "were merely ideas he was toying with without being seriously committed to them, or were ideas he briefly held but then thought twice about. In other words, during the period in which he wrote the books following ASU, he was considering abandoning libertarianism and this was reflected in what he says in those books."[29] Feser goes on to question the libertarian credentials of *even* Nozick of *Invariances*. Again in his own words, "in *Invariances*, unlike in ASU, there are no natural rights, the content and grounds of moral rules are somewhat fuzzy, etc., so that it is hard to see how you get the absolute (or near absolute) moral rules that ASU is committed to" (ibid.).[30] In short, some libertarians dismiss later Nozick as non-libertarian and continue to associate Nozick name with absolute or near absolute libertarianism. Since questioning the libertarian status of Nozick of post-ASU will be "no news" to non-libertarians and some libertarians, including Feser, the subsequent chapters will be devoted to examining the libertarian position Nozick held in ASU. Contrary to what some libertarians insist, I will contend that *even* Nozick of ASU cannot be ranked among hard-nosed libertarians.

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[28] While I question Nozick's status as a libertarian in his later writings, I think it is a gross exaggeration to label him among communitarians. This is so because even in his later writings, although rights are no longer absolute or inviolable, he nevertheless tries to place some value on individual rights, including the right to private property (PE 547-548). Perhaps it is more appropriate to describe him, as I have, as a 'disguise welfarist'.

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[29] Feser shared this with me in one of my private correspondence with him.

[30] Therefore, it is not surprising that in his defense of Nozick's libertarianism in his book, *On Nozick* (2004) he does not mention Nozick of *Invariances*, let alone defend Nozick's view in the *Invariances*.

Chapter 3

The Nozickean Conception of Natural Rights in ASU

Introduction

In this chapter, I will discuss the view of rights sustaining Nozick's entitlement theory. This will further lead to an examination of why he holds his entitlement theory and his absoluteness/inviolability of rights in tandem. Nozick's entire libertarianism is built on the foundation of his theory of rights. As we saw in Chapter one, for Nozick, entitlements originally generated by a principle of appropriation make up the entire structure of rights. Nozick justifies his absolute entitlement theory on grounds of the Lockean natural rights, or natural rights for short. Thus, his theory of rights plays an indispensable role in his minimal state in general and his entitlement theory of justice in particular. The principal aim of this chapter is to demonstrate that one could consistently maintain a commitment to both the natural right and redistributive taxation. Or to be more exact, I will try to show that Nozick's generic hostility to redistribution via taxation is inconsistent with fundamental values or ideals that underlie Lockean natural rights.

Some Definitional Preliminaries of Natural Right

A few terminological and conceptual issues have to be cleared up before entering into Nozick's core argument. Defining natural rights is no easy matter, and there seems to be no universally acceptable definition. However, something like the following seems to be uncontroversial: rights are natural, inasmuch as they exist prior to, and independent of, the existence of the civil or political institution, and set limits within which the state can justifiably operate. In other words, natural rights are not contingent upon the existence of state institutions: they exist in the state of nature. The idea of natural rights is usually contrasted with legal rights, rights which are purely conventional or contractual, and are created by the law or political authority. I will not touch on the contentious issue of whether there is such a thing as natural right. For the sake of argument, in what follows, I will take it that the Lockean natural rights exist.[1] That said, it should be mentioned that Nozick explicitly addresses the ontology of value, including rights, in his *Philosophical Explanations* (1981). For Nozick, values, including rights, have a 'realizationist' ontology: we are responsible for the fact that they exist, but they have features that we have to discover. At the most general level they have the status of a mathematical model, which is instantiated by people who have rights (See 1981: pp. 555-558).[2]

Despite the above "uncontroversial" definition of natural right, in what follows, I will use the term loosely; it will cover those theorists who emphasize the direct importance of liberty to the individual's pursuit of her own aims, rather than the tendency of liberty to promote other values like unity or an independent press. This group includes Nozick, Eric Mack, Loren Lomasky, Tibor Machan, and Jan Narveson. That said, I should indicate my awareness that some of these philosophers have tried to distance themselves from the natural right theorists. I have in mind Narveson and Lomasky who explicitly reject the natural right libertarianism in favor of contractarian libertarianism. Narveson, for one, as we saw in Chapter two, cheerfully accepts Gauthier's core claim that moral constraints are artificial, (not natural) resting on mutually advantageous conventions. However, Narveson rejects the argument of natural right theorists not on the grounds of the emphasis they place on liberty over social goods. Rather, he rejects their argument because he believes the libertarian morality cannot be grounded in any 'metaphysical' intuitions. It should be noted that Narveson and other contractarian libertarians, including the 'contractarian' Nozick of *Invariances*, wholeheartedly endorse the natural right libertarians' core claim that people have negative rights to life, liberty and property which are sufficiently extensive to morally exclude the possibility of state interference over and above the protection of those rights. In short, for the purpose of this thesis, natural right libertarianism should be construed in terms of the view that the value of liberty trumps social utility or any other consideration. Given this construal, I presume contractarian libertarians, including Narveson, wouldn't mind being called natural right theorists.[3]

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[1] Some philosophers have ridiculed the notion of natural rights. For example, Jeremy Bentham famously declared Locke's idea that the right to private property is a natural right "nonsense upon stilts". Recently, Liam Murphy and Thomas Nagel have echoed Bentham's criticism by contending that private property rests not on anything real, pre-legal and objective. Their entire book, *The Myth of Ownership* (2002*)*, is devoted to arguing against the existence of natural right.

[2] In Chapter two, we discussed the 'replacement' of 'natural' rights by genealogy-derived rights in his *Invariances*. Of course, this is not meant to imply that the Nozick of Invariances abandons his natural right libertarianism. Rather, the Lockean natural rights are derived from evolutionary considerations, that is, they are derived from natural selection.

Natural Rights as Lockean (Negative) Rights

When Nozick repeatedly avers that individuals have rights, he is obviously alluding to natural rights, axiomatically taking over the Lockean natural rights to life, health, liberty, and possessions (ASU: 10). As far as Nozick is concerned, the rights individuals have in the Lockean state of nature are the *only* rights there are. In short, Lockean rights are synonymous with natural rights. As Nozick puts it, "I use "Lockean" rights and entitlements to refer to those…against force, fraud, and so on. … I believe these are the *only* rights and entitlements people possess" (ASU: 225, fn, italics mine). However, Nozick does not give us any argument justifying why the Lockean rights are the *only* rights we ought to have, and not some other competing rights.

To appreciate Nozick's conception of rights, we can distinguish two kinds of rights: negative and positive. A *positive* right is simply a claim to something, while a *negative* right is a right that something ought *not* to be done to an individual. Negative rights are rights that prevent people from doing things to others. They are claims against all moral agents to refrain from doing certain things. They are said to be *negative* because they always prohibit external, other-agent interference. To concretely illustrate, if Y has a positive right to food, this entails that Z has a corresponding duty to furnish Y with food. So construed, positive rights and duties can be said to be logical or conceptual correlatives. In other words, positive rights require positive duties, that is, they require that we do something for, or provide something to others. By contrast, if Z has a negative right to food, then Y has a duty *not* to interfere with Z's food.

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[3] It can also be argued that the so-called contractarian libertarians join the natural right theorists in arguing that ownership rights are prior to social institutions, and constrain the form that those institutions can take. Both maintain that people become *natural* owners by engaging in appropriative acts, which create proprietary rights. Thus, one might say that contractarian libertarianism virtually collapses into natural right libertarianism. Indeed, in his recent interview with Peter Jaworski, a contractarian libertarian Narveson makes it clear that if by 'natural rights' we mean "the rights we would have antecedently to human law, government" then he is "a big-time proponent of "natural law.""

All stringent libertarians, including Nozick and Narveson, deny the existence of positive rights, insisting that all (Lockean) rights are exclusively negative (Narveson 1988: 59, ASU: 238). They, in other words, construe rights as essentially negative injunctions that oblige us, including governments, not to interfere with other peoples' *legitimate* entitlements. For this reason, negative rights are sometimes referred to as "rights of non-interference" (Wolff 1991: 19). The negative, non-interference nature of Lockean rights is signaled by the word "harm": I am both morally and legally required *not* to harm you in *life*, *health*, *liberty* and *property*. However, I am *not* legally required to furnish you with what you need in order to stay alive, to be in good health, to enjoy your liberty, or to take care of your liberty. Since adherence to a right to non-interference does not require a person to violate another right, on Nozick's conception of right, rights cannot conflict; indeed, a clash of rights is not even possible or conceivable.[4] In his own words: "No rights exist in conflict with this substructure of particular rights. Since no neatly contoured right to achieve a goal will avoid incompatibility with this substructure, no such rights exist" (ASU: 238).[5] Tibor Machan, also a libertarian, follows Nozick in aiming "at securing a foundation and explication of individual human rights that avoids any suggestion that genuine, bona fide individual rights can conflict" (Machan, 1989: 63). Narveson, congruent with Nozick and Machan, denies the possibility of conflicts of rights on the grounds that one can fulfill negative rights even while asleep. As he eloquently puts it: "negative rights are a sort of conceptual fence, with a bunch of signs telling all and sundry to keep off or to get clearance from the person in charge, the rightholder. Such rights would normally be satisfied by doing nothing at all: asleep in our beds, we fully respect our duty to refrain from murder" (Narveson, 1992: 49). Since, in a libertarian society, there is no such thing as a collision of rights, the government's role is reduced to the barest minimum. For there will never be the need for the government to get involved in resolution of conflicts of rights. This means that in the libertarian world, government would be involved minimally in the life of the individual. Thus, Nozick's construal of rights in terms of non-patterned negative rights can be said to be in perfect harmony with his libertarian minimalism.

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[4] This has led some philosophers to argue that in a libertarian society, rights are "compossible" (See Steiner, 1977).

[5] However, contrary to Nozick, a clash of negative rights is not unimaginable. For example, the cases of killing an innocent threat in self-defense seems to involve a conflict of negative rights: the threatened person's negative right to life conflicts with the innocent threat's identical right. Such an example seems as a counterexample to the claim that a conflict of right is impossible. Nozick seems to concede this much when he admits that he has no solution to the "incredibly difficult issues" (ASU: 35) involving cases of killing an innocent threat in self-defense.

This does not, however, mean that advocates of the doctrine of negative rights deny the existence of *special* or "contractual" positive rights and duties. Indeed, Nozick recognizes the existence and legitimacy of positive rights and duties emanated from contracts or special relationships *voluntarily* created. Nozick maintains that if an individual's "goal requires the use of means which others have rights over, he must enlist their voluntary cooperation" and thereby he can, if others so cooperate, "acquire a right to, for example, food to keep him alive" (ASU: 238). To be sure, in his recent book, Nozick reiterates and stresses the indispensable role "special" positive rights play in human society, counseling us to engage in voluntary exchange to improve our situations. "Voluntary exchange and cooperative coordination of behavior involves many opportunities for separate benefits that improve each participant's situation" (2001: 245). It must be emphasized, however, that since "contractual positive rights" or acquired rights arise only *consensually*, and are not possessed by all human beings, they are *not* natural rights. They are what some philosophers call rights *in personam:* they concern rights arising out of an explicit contract between *particular* individuals. A right of a creditor against his debtor is a paradigmatic case of a right *in personam*: if Y consensually contracts with Z that he (Y) will lend him (Z) money when (Z) is broke, then Z has a (positive) right against Y and Y has a corresponding duty to Z-a duty to loan Z when Z is insolvent. Here, it is Y's contract with Z that gives Z a claim against Y to lend him money. Thus, Z's right *in personam* is a claim against a single person, namely, Y. Y has the (positive) duty to loan Z but nobody else does. *In rem* rights are in sharp contrast to the right *in personam,* that is, the right that emanates from contract in which Z is owed a duty by only Y. As Feinberg rightly points out "Typically, in personam rights are positive and in rem rights are negative. My in personam right against Jones to repayment of his debt is a right to positive action from him, whereas my in rem right to the contents of my wallet is a claim against everyone to refrain from taking those contents" (Feinberg 1973: 59-60).

Since the (Lockean) rights Nozick talks about are all natural and general, they can*not* be rights *in personam*. On the contrary, Nozickean/Lockean rights are rights *in rem*: they are rights that apply to the whole world, and thus everyone has a correlative duty not to interfere with them[6]. A Right *in rem* is what the legal scholar Wesley Hohfeld famously calls a general "claim-right" (Hohfeld 1919). While Nozick does not put forward his conception of rights within an explicit Hohfeldian framework, I believe his conception of rights can better be understood with the aid of this Hohfeldian terminology. It should also be mentioned that although Hohfeld distinguishes four varieties of rights: claims, privileges, powers, and immunities, he is emphatic that only the claim right or in the language of Nozick, the negative right (or the 'ethic of respect' as he called it later), is properly called a "right" (Ibid). Thus, it is not unreasonable to define Nozickean rights in terms of the Hohfeldian "claim right."

While the right *in rem* is usually contrasted with a right *in personam*, the former can be said to be a collection of identical rights *in personam* — one right against each other in the world. For Hohfeld, as for Nozick, the *general* claim right is needed to explain an owner's right to exclude other people from invading his/her property. As Hohfeld puts it, "claim rights give the rights-holder a claim against others; those against whom the right is held. Those against whom the right is held have a duty to act or to forbear from acting" (Ibid). Thus, it can be said that *in rem* rights ensure that every non-owner has a duty to the owner not to use, damage or destroy the property without the owner's express consent. *In rem* rights are claim rights in the sense that they impose on others a duty to refrain from interfering. Positively put, they confer on owners the right to exclude others from use; and the right to alienate, including the right to transfer and the right to destroy.

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[6] *In Personam* rights are similar to "special rights" in Hart: "When rights arise out of special transactions between individuals… both the persons who have the right and those who have the corresponding obligation are limited to the parties to the special transaction… ("Are There Any Natural Rights?" p. 84.) *In rem* rights, on the other hand, are comparable to Hart's "general rights", rights which "do not arise out of any special… transaction between men" but "are rights which all men capable of choice have…" ibid. 87-88.

It is also worth mentioning that the possession of the general (*in rem*) negative rights, unlike the possession of positive *in personam* rights, is not contingent upon the consent of others. Nor do *in rem* rights arise out of any special arrangements between individuals. In short, *in rem* rights are rights *all* persons have in virtue of being persons. Nozick believes the claim-right involved in property is general, in the sense that not just one person but *every* other person owes the bearer of such a claim a duty. Consequently, in what follows, I shall construe the Nozickean conception of rights in terms of claim-rights *in rem*: rights "against the entire world."

Legality vs. Morality

It is crucially important to notice that although Nozick's insistence that the Lockean (natural) rights are equivalent to negative (*in rem*) rights presupposes that the wealthy can choose to destroy their surplus while the poor are starving to death, he would, without a doubt, *morally* chastise the affluent who neglect the needy[7]. This point is worth mentioning because it has been a customary theme of some detractors that Nozick's system condones immoral action by not encouraging the rich to help the poor. Samuel Scheffler, as we noted earlier, maintains that Nozick "would apparently judge it a *morally superior* outcome if the cripples and orphans died than if the government taxed its citizens to support them" (Scheffler in Paul, 1982: 167 n4, my emphasis). While Scheffler is obviously right that Nozick would say that the government cannot legitimately tax its citizens to support the cripples and orphans, in my opinion, he is absolutely wrong in suggesting that Nozick would recommend immoral actions on the part of the wealthy citizens. Indeed, libertarians in general, and Nozick in particular, would judge it morally an abhorrent outcome if the affluent citizens consciously ignored the plight of the poor, orphans and cripples leading to their untimely and avoidable death. Similarly, he would unhesitatingly castigate an insensitive millionaire, to use Cohen's example, who refuses to give a five dollar bill to a starving child but chooses to use it to light his cigar while that child dies in front of him (Cohen 1995: 31 n. 28).[8] However, Nozick would unreservedly condemn any *legal* action taken by the government or any individual against the *immoral* millionaire. Put differently, although Nozick would deny that anyone, be it a private person or especially the state, would be justified in coercing the rich to help the poor, his system certainly does encourage the affluent to contribute to the welfare of the unfortunate poor.

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[7] Nozick's four-level structure, though absent in ASU, could be utilized to make this point (more) emphatic. With his post-ASU endorsement of the four-level structure, taxing the rich, thereby violating their right 'minimally' in order to achieve a higher moral goal is okay. In short, his four-level moral structure requires the rich to assist the needy. Indeed, at one point, Nozick makes it clear that his major complaint with ASU is that it overlooks what the four-level makes salient. Particularly, he explicitly concedes in his *The Examined Life* that failure to incorporate the four-level structure into ASU was a deficiency in that book (See TEL: 286-287, c/f ToR: 32).

It is also worth emphasizing that even in ASU where Nozick stringently holds that only ethic of respect (respect of negative rights) binds all and sundry in the name of justice, he believes that individuals and societies can commit themselves to perfectionist moral goals over and above the ethic of respect, i.e., the libertarian negative rights. In other words, Nozick seems to hold the view that individuals and societies would help the needy on moral grounds. It stands to reason that Nozick's system is not an abdication of morality or moral principles. Nor does his system attempt to substitute his libertarian principles for a moral standard, as some critics would make us believe. Indeed, nowhere in ASU does Nozick either explicitly or covertly endorse immorality, amorality or nihilism. On the contrary, he admonishes people to live virtuous and responsible lives.[9] As we noted, he believes conformity to moral principles is necessary in that moral principles help us improve our situations. It should also be stressed that although Nozick holds that anything that violates rights is objectionable, he does *not* say that anything that does not infringe upon rights is good or virtuous. In my estimation, he would repudiate *even* immoral conducts that do not violate individual (negative) rights. Thus, Jonathan Wolff is right when he writes:

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[8] It is interesting to point out that Nozick of post-ASU could easily handle Cohen's criticism. As we saw in Chapter 2, the four-level moral structure which Nozick sets out in *The Examined Life* and salutes in *Invariances* enjoins the rich to help the needy. Specifically, the second layer, namely, the ethic of responsiveness requires the millionaire in Cohen's example to respond to the plight of the poor. Similarly, the third layer, the Ethic of Caring, enjoins him to demonstrate caring attitude towards the poor, while the fourth layer, the Ethic of Light requires him to become a selfless vehicle of goodness by acting generously towards the destitute.

[9] While Nozick would insist that traditional moral rules ought not to be enforced by the state, he would not deny their validity.

> [Nozick] certainly does not recommend that they ignore the plight of the poor. He does not seek to discourage private philanthropy. A libertarian may go so far as to say that it is immoral for the rich to let the poor starve if they are in a position to do anything about it: The rich ought to engage in private redistribution schemes. But it is essential to make the distinction between the morally right and what it is right to enforce by law. It may be wrong not to give to charity, but, for a libertarian, this is no reason to force someone to contribute. Property rights trump duties of benevolence (Wolff 1991: 12).

In short, while libertarians in general, and Nozick in particular, insist that we may not be coerced into fulfilling our moral duties, they believe we have moral responsibilities to aid those in need.

To understand better Nozick's argument, we need to look at the distinction he draws between morality and legality. It is an important claim of his political theory that what is morally right is distinct from what is (legally) right to enforce by law.[10] Failure to appreciate the morality/legality distinction in Nozick has, as we have seen, *mis*lead some philosophers to conclude that his system promotes immoral actions. Explicit evidences abound that Nozick recommends and, indeed, encourages moral actions. Voluntary charity is highly promoted by him, and he never gets tired of stressing the positive role private philanthropy plays in society. Indeed, an entire section is devoted to the issue of philanthropy and what people may do to help others voluntarily (See ASU: 265-268).

While charity is a virtue Nozick prizes, in ASU, he is sensitive to the fact that political philosophy and moral philosophy play different, if not distinct, functions. Whereas political philosophy concerns itself exclusively with issues that have to do with physical aggression or harm, moral philosophy essentially deals with moral issues. Thus, morality, for Nozick, as for Kant, is an entirely *inner* matter. Of course, I do not mean to imply that moral philosophy and political philosophy are always mutually exclusive. I am well aware that many moral questions are also political, and vice versa. My point is that both Kant and Nozick believe political philosophy deals with issues that are 'external' whereas moral philosophy concerns itself with issues that are 'internal.'[11] Let us illustrate the difference between the two: it will be morally wrong to just let Y die on Z's property while doing nothing to try to save Y. But since Y has no right that Z act to that effect, whether Z's refraining from acting is morally wrong or not is not germane to *political* philosophy.

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[10] The distinction between morality and legality is not original with Nozick. Nozick seems to follow Kant, who explicitly demarcates between what he calls the Moral Law and the Principle of Right or the Legal Law. I shall, however, contend that Kant's considered view that governments are justified even in "compelling prosperous citizens to provide the means of preserving those who are unable to provide themselves" (*Political Writings*, 149) annihilates his legality/morality distinction. As well, this claim commits Kant to endorsing both positive and negative rights. I justify this claim later in this chapter.

Indeed, Nozick makes it pellucidly clear that the issue of what it means to "use" another outside the context of rights is no issue for political philosophy: "In getting pleasure from seeing an attractive person go by, does one use the other solely as a means? Does someone so use an object of sexual fantasies? These and related questions raise very interesting issues for moral philosophy; but not, I think, for political philosophy" (ASU: 32). This is so because "political philosophy is concerned only with *certain* ways that persons may not use others; primarily, physically aggressing against them" (Ibid. 32). To dramatize the difference further, that a man in his fantasies conceives of himself as a "male chauvinist pig" is not a fit subject matter for political philosophy. However, his *raping* his "object" is an issue that falls within the purview of political philosophy. This is because raping constitutes a significant violation of another's (negative) rights of non-interference. As we shall see in Chapter 5, on Nozick's interpretation, our bodies are our properties in the sense that we own them. This being so, raping is an act of physical aggression, and thus falls squarely within the domain of political philosophy.[12]

This is not to imply that libertarians regard political philosophy and moral philosophy as two antithetical and unrelated disciplines. On the contrary, they acknowledge the positive correlation between the two. As Nozick puts it: "Moral philosophy sets the background for, and boundaries of political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus" (ASU: 6). Nozick's point is that what it is legally wrong to others is a *subset* of what it is morally wrong to do to others. Simply put, *moral issues that have no bearing on our rights are beyond the purview of political concern.* That is, justice is not the whole of morality. Put otherwise: Moral principles involving rights — e.g., principles forbidding killing, stealing etc. — are legitimately enforceable by the state, but those which do not involve rights; however virtuous or vicious they might be, are not enforceable by the state. For libertarians, even apparent immorality among consenting adults who refrain from force and fraud is not the government's business.[13] Thus, rights, from Nozick's standpoint, exhaust only the enforceable obligations we have to one another. As he elucidates in one of his later writings, "In no way does political philosophy…exhaust the realm of the morally desirable or moral oughts. … But rights are not the whole of what we want a society to be like, or of how we morally ought to behave toward one another. Political philosophy is not a complete moral theory, nor was meant to be" (PE, 503).

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[11] By morality, Kant refers to a very specific conception, namely, that morality is an entirely *inner* matter: i.e., *Moralität* in the narrow sense. For Kant, the inner source of morality is the only source of morality there is. Accordingly, moral duties cannot legitimately be enforced externally. The state is in no position to "invade" the inner lives of citizens and so must be completely indifferent to their inner attitudes.

[12] It is characteristics of Nozick and some libertarians to reduce all rights to property rights. This being the case, libertarians insist that any violation of a person's right is tantamount to a violation of a person's property, which, in turn, is an act of physical aggression. In short, personal liberty is equivalent to property right in oneself. Of course, one may question the libertarian's rigid association of property right with self-ownership, since it is possible to violate one without the other being violated. This is an issue I will be dealing with explicitly in the discussion of self-ownership in Chapter five.

In my opinion, Nozick is right in distinguishing between the role of political philosophy and moral philosophy. For if moral issues were always made the business of states, political authorities would try to legislate and enforce moral laws. The end results would be subjection of subjects' inner life to coercion. Indeed, given that most, if not all, moral philosophers unquestionably insist that morality and freedom are inextricably linked, one might say that it is conceptually impossible to command moral virtue. Thus, to coerce a person to act morally seems tantamount to depriving the person of acting virtuously.[14] Nozick's political/moral philosophy distinction allows him to consistently argue in favor of 'voluntary' charity but against forceful redistribution. In other words, the distinction is designed to buttress the point that charity is a matter of moral right, not a legal/natural right.

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[13] Libertarians insist that moral principles involving the inculcation of virtues and avoidance of vices, such as principles forbidding adultery and fornication, are properly enforceable through the everyday practices and moral praise and blame. This being the case, a behavior, however morally abhorrent, as long as it does not involve a right violation, does not justify government interference.

[14] This fact motivated Kant to contend that all attempts to force people to behave morally are doomed to failure, since people can only force this upon themselves through an act of will. Thus, it is impossible, on the Kantian account, to impose duties of virtue upon someone. Indeed, Aristotle, though an anti-libertarian, would definitely agree with Kant and libertarians that morality cannot be commanded by government or anyone else. Aristotle, congruent with Kant, insists that morality required choice, and choice, in turn, requires freedom.

Some scholars, as we shall see shortly, have argued that even if one admits to the efficacy of voluntary charity as a means of assisting the poor, the concept of charity is incompatible with libertarian rights. Those who hold this view contend that being free is a vital, necessary prerequisite for having a right; therefore, an unfree person cannot be said to have a genuine right. According to this argument, since the livelihood of the poor depends on the capitalist — in the sense that the poor survive through the capitalist's charitable provision or employment — the poor cannot be said to be free in the true sense of the word. Philosophers who have taken this line of criticism include Michael Teitelman and Andrew Kernohan. For example, in criticizing Nozick's libertarianism, Teitelman insists that voluntary charity is unacceptable because it unduly deprives recipients of genuine freedom. As he puts it, "Dependence on the generosity of others, like destitution, is not a way of living freely" (Teitelman 1977: 506). Teitelman's basic argument roughly runs as follows: since Nozick places considerably emphasis on the importance of rights of all human beings *including* the poor, and since charity erodes the rights of the poor (to control their destiny), Nozick's libertarianism borders on self-refutation. In short, Tietelman's argument is evidently designed to show that it is internally incoherent to hold to voluntary charity, while at the same time according individual rights the highest weight, as Nozick does.

I cannot take this controversial matter up beyond noting that if voluntary charity really creates the culture of dependence and divests people's freedom and rights, as Teitelman would have us believe, then a lot of people will be unfree. Tietelman's argument presupposes that most citizens of the so-called "third world countries" who receive financial aid from charitable organizations and prosperous individuals are not genuinely free. To say, however, that a person who relies on the generosity of others is not free is, in my judgment, to significantly misconstrue the nature and purpose of philanthropy. Arguably, charity and freedom are not mutually exclusive.

Indeed, one might say, with some plausibility, that charity is basically designed to assuage the economic plight of the poor, and thereby enable them to eventually gain their independence and autonomy. Charity is by and large considered temporary and offered with the object of helping the poor to help themselves. It is not meant to keep recipients in a state of perpetual dependence. In other words, *charity is used as a key or tool to independence*. It is only a means to an end, the end being full autonomy or independence. In what meaningful way, one might plausibly ask, do the poor have rights and freedom to do anything if they, as a result of poverty, cannot exercise their rights and freedom?

It should be noted that Teitelman's implicit claim that charity is an attack on the 'independence' of the poor is equally question begging: we only feel something to be an assault on our independence if we already believe that it is wrong. Simply stated: charity will feel like an assault on our independence *only if* we are convinced that it is morally wrong. If we believe instead that charity is a necessary requirement to help the poor exercise their right, then it will serve to promote, rather than attack, the right of the poor (C/f Kymilicka 2002: 125). It is no exaggeration to say that extreme poverty can render nugatory any talk of rights and freedom. Consequently, it is not unreasonable to say that voluntary charity, rather than depriving the poor of their rights and freedom, helps them to *concretely* exercise their rights. Thus, in opposition to Teitelman and Kernohan, it can be concluded that Nozick's doctrine of voluntary charity can be made to cohere with his theory of rights.

Ironically, the validity of the detractors' argument above seems to inadvertently validate Nozick's own criticism of taxation through welfare programs and mandatory redistribution. With delicious irony, Nozick and libertarians could use the detractors' argument against them by contending that if voluntary charity deprives the poor of their freedom and rights, then welfare recipients are not living freely or autonomously. In short, libertarians would capitalize on the arguments of their opponents and dismiss welfare programs as constituting violation of the rights and freedom of welfare beneficiaries! Thus, they could argue that welfare programs not only violate the rights of the givers, but it also violates the rights of the recipients. To be sure, some opponents of welfare states have employed Tietelman's "culture of dependence" argument to argue against taxation and welfare institutions, criticizing welfare policies on the grounds that they "stigmatize" recipients. Tocqueville, for one, has contended vociferously that any society which tries to assist the poor rather succeeds in publicizing and legalizing inferiority. He holds that society degrades the poor by offering them help. For him, it is shameful to depend upon the state for survival since it is an admission of inadequacy, "a notarized manifestation of misery, of weaknesses, of misconduct on the part of the recipient" (Goodin 1988: 363-364, 366).

My reason for bringing up Tocqueville's argument here is not that I agree with him that assisting the poor is tantamount to promoting inferiority or dependence. Nor do I agree with him that charity is demeaning and stigmatizing to the recipient. I brought it up just to show that advocates of welfare states could not, in all consistency, reject libertarians' doctrine of voluntary charity on the basis that it deprives recipients of freedom and autonomy. Indeed, their argument seems to carry with it the seed of its own destruction. This is because, welfare recipients, like charity recipients, depend on the generosity of the state, which is the embodiment of individual citizens. If both voluntary charity and welfare programs create culture of dependence and destroy individual rights, then opponents of libertarians cannot, on pain of contradiction and inconsistency, embrace welfare programs and reject voluntary charity at the same time.[15] Since opponents of Nozick's doctrine of charity, including Teitelman and Kernohan, incontestably embrace taxation through welfare programs, one might conclude that their argument against Nozick is self-incriminating, if not self-destructive.

Philanthropy, Welfarism and the Lockean/Nozickean Rights

Having attempted to salvage Nozick's doctrine of philanthropy from its critics, I think libertarians, including Nozick, make fundamental and shaky assumption: that human beings are charitable and generous enough to voluntarily assist the needy. They therefore imply that in the absence of state intervention, the needy will be taken care of by the benevolent rich.[16] Nozick, in particular, as we saw, adamantly maintains that in capitalist societies, individuals will voluntarily commit themselves to moral goals beyond the libertarian negative rights. He sanguinely believes individuals and societies will recognize *moral* reason to help the needy, and thus ingrain that moral reason in their social institutions. He implies that 'compulsory' taxation will be unnecessary, if not redundant, since the munificent rich capitalists will help extricate the unfortunate individuals from the manacles of poverty[17]. In his own words: "in a capitalist society people often transfer holdings to others in accordance with how much they perceive these others benefiting them… (Gifts to loved ones, bequests to children, charity to the needy are nonarbitrary components to the fabric)" (ASU: 159). Thus, he believes in a libertarian capitalist society, voluntary charity will abound. His argument presupposes that the handicapped, the poor and the disadvantaged will not suffer anymore than they do with government assistance through taxation. To be sure, he thinks since charities are much more capable of providing for the needy, the needy will be *better* taken care of under the libertarian capitalist society.[18]

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[15] I am not by this supporting Nozick's view that charity should be purely voluntary. Without a doubt, many of poor people in society will perish if charity is made voluntary. This is because many rich people will choose not to be charitable. However, to argue against voluntary charity on the grounds that it kills the recipient's independence, in my opinion, logically commits one to rejecting welfare programs as well.

The plausibility of libertarians' argument rests on the assumption that individuals are generally philanthropic. It is this generic assumption that I intend to take to task. Before I do so, however, I would like to discuss the basis from which libertarians draw their optimistic conclusion, to wit, that the rich will willingly assist the poor. Some libertarians, notably Narveson, appeal to David Hume's doctrine of sympathy to defuse the charge that they are self-interested and coldhearted. In both his *Treatise of Human Nature* and *Enquiries*, Hume famously contends that human beings are motivated by sympathy or "natural philanthropy", as he sometimes calls it, without ever giving the thought to moral norms and political authority. The mechanism of sympathy, coupled with benevolence, according to Hume, enables us to empathizingly place ourselves in the position of others, eventually motivating us to help the needy (See the *Treatise* Bks., II and III and also *Enquiry* Sec. II, Parts I and II).

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[16] Libertarians might add that a minimal government will voluntarily seek to help the poor through 'voluntary taxes'.

[17] Libertarians have another argument to support their claim that welfare programs are needless: the free market is a self regulating mechanism, and that Adam Smith's "invisible hand" will work to ensure that no-one starves or suffers extreme poverty. This being so, libertarians conclude, a welfare state is unnecessary — the free market does the job anyway, and does it better.

[18] It is not clear how Nozick can sustain this optimistic claim without jeopardizing his argument against the individual anarchist. As we saw, Nozick dismisses the anarchist's claim that even a minimal state is morally objectionable, insisting that the libertarian minimal state is necessary to safeguard natural rights. However, if people are that charitable and sympathetic, as Nozick's argument presupposes, then one might say that even the minimal state is not needed to constrain people, since they would be motivated by charity and sympathy to respect individual rights, anyway. Nozick might respond to this by invoking his "invisible-hand" account of the emergence of the state, according to which a state is *not* needed; but we will get it anyhow, whether we like it or not. However, the anarchist who rejects the invisible-hand explanation would have no reason to endorse the libertarian minimal state.

Libertarians think they follow Hume in contending that in the absence of coercive civil authority or state intervention, sympathy will motivate the affluent to voluntarily help the unfortunate and/or the disadvantaged. Here, I have in mind Narveson, who has explicitly contended that libertarians' objection to welfare programs does not imply that the poor will be left unaided. He invokes the authority of Hume to underscore this point: "The behavior of ordinary people of the world over attests to the plausibility of Hume's view that there is strain of sympathy in us all; the astonishing volume of charitable giving in the United States suggests, too, that the richer people are, the more those sympathies will find outlet" (Narveson 1998: 23).

I am sympathetic to the view that sympathy and our psychological make-up can sometimes cause us to voluntarily assist the needy. Undeniably, Narveson's reference to charitable giving in the United States has some empirical warrant.[19] However, we should not lose sight of the obvious fact that in the midst of unrestrained capitalism, for example, in the mid-19th century, there were a sizeable number of people who lived below the poverty line, and who were left to wallow in abject poverty and misery.[20] In fact, human history presents more cogent evidence that in the absence of state intervention; philanthropy or sympathy will not be adequate to keep numerous people from leading dismal, poverty-stricken lives. To insist otherwise is to display extreme ignorance and naiveté of history. Taking into account the obvious fact that not all the affluent are inherently sympathetic, I do not share libertarians' optimistic belief that the relief of the poor can be made to rest on the promptings of natural affections, such as benevolence and sympathy.

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[19] The fact that Bill Gates, Oprah Winfrey and other billionaires have been voluntarily helping the poor in developing countries attest to the fact that natural compassion and sympathy do, indeed, sometimes prompt *some* people to help the poor.

[20] In response, one might say that this is just the sort of "moral horror" that calls for different measures than the entitlement theory. I will discuss Nozick's doctrine of "catastrophic moral horror" and its relationship to his entitlement theory in Chapter 4. Suffice it to say now that if Nozick resorted to this line of response, he would be committed to saying that rights could be justifiably overridden to avoid some catastrophe. In short, Nozick could no longer invoke his entitlement theory to defend the libertarian absolute rights.

Even if, for the sake of argument, one concedes that *all* the rich are sympathetic, one is not logically committed to concluding that every single one of them would actually help the poor. This is due to the fact that sympathy does not automatically supply everybody a motive to assist those in desperate need, as libertarians would have us believe. Libertarians seem to imply that if we are generally compassionate or sympathetic toward our fellow human beings, then we will be moved to act morally. That is, they seem committed to holding that sympathy automatically translates itself into motivation and action. However, it is perfectly conceivable for a person to be equipped with sympathy, and yet remains indifferent to the plight of the poor. In other words, it is one thing to feel sympathy for a person, but quite another to be motivated to help that person. Consequently, some rich people may feel sympathy for the poor, but nonetheless refuse to give them alms[21]. Let me illustrate this point with some familiar advertisements often placed on the television by relief agencies: "Here is Mamuna, an eight year old girl from Rwanda. Soldiers shot her parents when she was three. Her grandparents who were looking after her lost their lives a year ago. Since she has no one else to cater for her, she is slowly but painfully dying of starvation. You can save her by sending us *just* about $20 each Month." When we see Mamuna and other numerous orphans on the television dying of starvation in poor parts of the world, we express great sympathy. In fact, some of us become overwhelmed by emotions so much so that we are unable to contain our tears. However, only few of us are moved to offer a few dollars a month through an aid agency to salvage Mamuna and other poor innocent children. This practical example underscores my contention that being sympathetic is not sufficient to motivate a person to act.

Ironically, Hume — from whom libertarians take their inspiration — rightly acknowledges that unlimited sympathy is not one of the common virtues of human beings, stressing that we sometimes lack the psychological ability to divest ourselves of our particular egoistic standpoint. Considering that sympathy sometimes seems powerless to prompt the rich to help the poor, it comes as no surprise that some philosophers have expressed some skepticism about the efficacy of philanthropy based on mere sympathy. Some thinkers have compellingly argued that human life is so precious that the poor cannot and should not be left at the mercy of voluntary charity. Thomas Hobbes, for example, has cast doubt upon the reliability and sufficiency of charity:

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[21] It might be replied that the affluent, devoid of sympathy, will be motivated to help out the poor by moral pressure. While this seems to be a fair claim, it cannot be denied that some rich are unmoved by moral pressure or blame.

> Whereas many men, by accident unevitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for, (as farforth as the necessities of Nature require,) by the lawes of the Common-wealth. For as it is Uncharitablenesse in any man, to neglect the impotent; so it is in the Soveraign of a Common-wealth, to expose them to the hazard of such uncertain Charity (*Leviathan*, chap.30, 387).[22]

The import of Hobbes' argument, if I understand him correctly, is that since charity is not enough to help the needy, the responsibility of taking care of them should rest squarely on the state. Indeed, in *The Examined Life*, Nozick seems to agree with Hobbes that voluntary taxation is not enough to help the poor. Having argued in favor of taxation, he anticipated this objection: "Well, why don't those who want and need such a society voluntarily contribute to pay for its public programs rather than taxing the others, who don't care anything about it?" (1989: 289). As a comeback, Nozick writes: "But a program thus supported by many people's voluntary contributions, worthy though it might be, would not constitute the society's solemn marking and symbolic validation of the importance and centrality of those ties of concern and solidarity" (Ibid. 289). In short, Nozick now appears to acknowledge that 'voluntary' taxation cannot do the job of alleviating the plight of the poor.

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[22] In the same vein, J.S. Mill has contended that the poor cannot rely on voluntary charity simply because charity may not always go to those who are really in need. "Charity almost always does too much or too little: It lavishes its bounty in one place, and leaves people to starve in another." (*Principles of Political Economy*, 46) Accordingly, he maintains that charity given to the poor cannot fulfill the obligations of the state, adding that it should be incumbent upon governments to offer the poor public assistance. Similarly, Thomas Nagel has argued that the poor are so numerous that holding the view that contributions be voluntary is an "excessively demanding moral position" adding that "excessive demands on the will…can be more irksome than automatic demands on the purse." (Nagel, *Book Review*: 154-6) Libertarians might react to Nagel's criticism by contending that voluntary charity would be a severe moral position if many people were poor. However, since the benefits of capitalism will make few, if not none, be in a condition of extreme need to merit charity, the moral responsibility of the rich towards the poor would not be "excessively demanding". However, I will argue later that the claim that capitalism always raises the standard of living of the poor lacks empirical warrant, and thus the plausibility of Nagel's and Mill's argument remains undiminished.

Given that charitable giving is insufficient to ameliorate the economic plight of the poor, coupled with the fact that not all the rich are charitable, not to mention the fact that charity does not *necessarily* metamorphose into action, one is led to the conclusion that Nozick's promotion of private philanthropy in ASU as a sufficient means of alleviating the economic burden of the poor would not exonerate him of the indictment that his system ruthlessly leaves most of the poor and unfortunate among us to suffer needlessly. More significantly and relevantly, one might say that since the poor are left out in the productive process unaided, Nozick's theory of rights, as defended in ASU, would be without a substance to them. Let me elaborate on this last point.

As I pointed out earlier, Teitelman and Kernohan have maintained that charity, *even if efficacious*, renders recipients unfree and "rightless". They therefore dismissed Nozick's doctrine of philanthropy as inconsistent with his theory of rights. In defense of Nozick, I contended that since charity is generally considered temporary and offered with the purpose of helping the poor to gain autonomy and enjoy their Lockean rights, Nozick's concept of philanthropy is not, in and of itself, antithetical to his theory of rights. It is crucially important to emphasize that in defending Nozick's doctrine of philanthropy against his philosophical opponents, I *assumed* that his doctrine of philanthropy or sympathy, was effective. There, my point was that the efficacy of Nozick's doctrine of charity would rather enhance the plausibility of his theory of rights. However, as I have demonstrated, since by Nozick's own admission, the poor cannot survive solely on voluntary charity, and since people leading miserable, and poverty-stricken lives can hardly think of rights let alone enjoy them, the Nozickean right would have no meaning or import to the poor.

Admittedly, this point is not a knockdown argument against Nozick's theory of right, since, at least in ASU, Nozick does not say that having a right is equivalent to exercising it. Indeed, libertarians would say that while governments have the responsibility to make sure that the rights of citizens are not violated, it is beyond the purview of governments to ensure that those rights are exercised. After all, Nozick might add, the minimal state is there to protect citizens' rights; it is *not* there to help citizens exercise their rights! While I admit the theoretical coherency of the distinction between having a right and exercising that right, I think, in my opinion, it would be an affront to say that a person, whose very survival is under threat due to extreme poverty, has a right to life, liberty and possession. In other words, although it is true that having a right and exercising that right are not the same, it is not absurd to say that there is a correlation between material prosperity and the exercise of the Lockean rights. Indeed, it is not an exaggeration to say that an extremely poor man's "right" would remain at best purely formal. Nozick's unconcern about "concrete", as opposed to formal, rights in ASU, makes him vulnerable to the charge that he is "a one eye-man" who sees nothing but formal rights and so turns his back on what might happen in the real world when people exercise those rights — much more open than is Kant — since the charge of "empty formalism" often directed against Kant, in my view, rests on a quite one-eyed reading of the Categorical Imperative.[23] Given that in the real world rights are meant to be exercised, one might say that formal rights are no rights at all. Having rights but not being able to put them into use is analogous to owning a corkscrew without wine bottles to open. The corkscrew, like 'formal' right, is of no value! Thus, Nozick's claim that we all have (formal) rights cannot be taken seriously, especially by those who lack material resources to put their rights into effect.[24]

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[23] Kant's first formulation of the Categorical Imperative, the so-called Formula of Universal Law, has been subject to numerous attacks based on the charge of formalism. It states: "Act only according to that maxim whereby you can at the same time will that it should become a universal law", (*Grundlegung*, 421/30.). However, to say that this represents "empty formalism"—that this means nothing concrete in practical life—is not to tell the whole truth. Consider, for example, why Kant believes the lying maxim fails the universalizability test: If everybody were to lie, lying would no longer be possible since when everyone may tell lies no one will believe what you say. Therefore, the maxim of lying cannot be universalized without simultaneously "destroying itself". The *practical consequences* are what make it impossible to consistently will (the maxim of) lying to become a universal law. While the Categorical Imperative might be said to be "formal" at the outset, then, it *does* yield conclusions concerning consequences; it is not "empty" since it enables us to take consequences as regards social order into consideration.

[24] The fact that Nozick has, in general, next to nothing to say about empirical consequences of having rights, in my estimation, robs his theory of right of any plausibility. Indeed, in ASU, Nozick does not really "care" about empirical consequences of his libertarianism in general. For example, as regards to the crucial question of how viable his libertarian vision is, he tries to "get away with it" by "covering up" his reluctance to discuss the topic of empirical consequences by employing a considerable doses of rhetoric: "Well, what exactly will it all turn out to be like? In what direction will people flower? How large will the communities be? … I do not know, and you should not be interested in my guesses about

If charitable giving were to be sufficient to take care of all the needy, then Nozick and libertarians would be right in insisting that we do not need the state in order to assist the needy. However, as it has been repeatedly indicated, since charity is not sufficient to help the poor, and since the unaided poor might not recognize the existence of their negative rights, taxation through welfare programs seems necessary to supplement charitable giving. Thus, taxation meant primarily to assuage poverty and suffering can, and should, be viewed as promoting, rather than violating, individual rights. Still, one may be inclined to dismiss my argument as conflating the distinction between rights and the power to exercise them. However, as I have conceded earlier, while the two are not the same, they are not completely distinct either: In reality, those who lack the power to exercise their God-given (Lockean) rights regard themselves as having no rights! Thus, equipping the poor with the "power" to exercise their rights by taxing the rich would go a long way in helping them to "actualize" their rights.

Of course, libertarians would impatiently retort that since the rich would be coercively taxed to help the poor, the state unquestionably violates the right of the rich. To strengthen their argument, they might add that since charitable giving is not grounded in justice or (negative) rights, if charity turns out to be inadequate or even inefficacious, the poor have no *legal* reason to complain.[25] Simply put: the poor cannot enjoy their rights by encroaching upon the rights of the rich. That libertarians would resort to this line of reasoning is evidenced in their belief that being in a state of absolute necessity does not automatically entitle one to charity. Nozick of ASU

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what would occur under the framework in the near future. As for the long run, I would not attempt to guess. ... Only a fool, or a prophet, would try to prophesy the range and limits and characters of the communities after, for example, 150 years of the operation of this framework" (ASU: 331-332). However, these are all very provocative and important questions -- far too important to be ignored.

[25] Nozick of *Invariances* and the *Examined Life* may retort: "they have no moral reason either, at least of one form: "I am being treated unjustly." Other moral reasons, as we saw in the previous chapter, are available to them, according to the four-level structure: My reality is not being responded to (level 2), An appropriately caring attitude is not being demonstrated towards me (level 3), and those around me are not doing as much good they could" (level 4). While this invocation of the four-level structure significantly enhances the plausibility of his argument, if Nozick actually invoked it, then we might cast doubt upon his libertarian status in ASU, as well. I argued extensively in Chapter two that Nozick's endorsement of the four-level moral structure, with its corollary principle of Minimum Mutilation, makes him a less libertarian, if not a non-libertarian. This is so because, as we saw, the principle calls for right mutilation, although minimally so in accordance with the four-level structure and its principle of minimal mutilation. In short, while the four-layer structure adds plausibility to Nozick's argument, it is inconsistent with his libertarian philosophy.

speaks for libertarians when he contends that "a right to life is not a right to whatever one needs to live; other people may have rights over these other things… the right to life cannot provide the foundation for a theory of property rights" (ASU: 179). The point Nozick is trying to drive home is that even necessity is no defense to a violation of legitimate property rights. In other words, since property rights trump charity, from libertarians' viewpoint, under no circumstances should the rights of the poor be salvaged or exercised at the cost of the right of the rich. This being so, libertarians would conclude that if charity conflicts with the right of the rich, then *so much the worse for charity*!

While this response seems to square with the tenets of libertarians' theory of negative rights, it unduly underestimates the repercussions abject poverty has for the rights of both the rich and the poor. One might argue that the right of the rich is not secure when the poor are deprived of their livelihoods to the point of death. It might be replied that if this is a good argument, then a libertarian state would take it on board by enabling a "voluntary tax" for relief of the poor. However, as Nozick himself acknowledges in his *The Examined Life*, voluntary contribution or tax is not sufficient to help the poor. Besides, it seems hopelessly optimistic to suggest that citizens of a libertarian state would assist the poor through voluntary tax. While I don't share Hobbes' pessimistic conception about human nature, I do not believe human beings are unlimitedly benevolent, either.

The bottom line is this: preferring life to death, the starving and dying poor will do everything possible — including stealing other peoples' property — to ensure their survival. Thus, libertarians claim that a right to life cannot prevail over property rights goes against our intuition, common sense and logic.[26] For one needs to exist before one can make any claim of a right to life, liberty and property. Without life, any talk of property right seems preposterous. As J.D. Hodson shrewdly puts it "To say that someone faced with certain death must respect the property rights of someone who would lose nothing but a bit of property ... seems an outrageous inversion of values" (Hodson, 1977: 225). Indeed, a person faced with inordinate poverty and starvation to the point of death will not, and *cannot*, respect the property right of the rich. Thus, the poor dying of starvation cannot help themselves violating the property of the rich. To ask the dying poor to respect the rations of the rich, for example, is to ask him/her to do what is both psychologically and conceptually impossible.[27]

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[26] However, some commentators think the common law rule rather seems to be on libertarians' side. Waldron writes: "No actual property system can include among its legal rules a right that anyone may take from the holdings of another what he needs to survive. Necessity in our law is no defence to theft or trespass" (1988: 283). However, one might argue that life is so valuable that it would not be out of place if legal rules always favored those who were in desperate need through no fault of their own. Indeed, anybody who legally incarcerated the poor for stealing food in order to survive would be considered "inhumane"!

Thus, just as Nozick insists, against the individual anarchist, that without the state we cannot enjoy our rights, we can say that without material assistance of the state to the poor, the rich cannot enjoy their rights. Put differently: Since the rights of the rich are vulnerable in the midst of extreme poverty and misery, and since sympathy is not enough to mitigate the plight of the endangered poor, failure to assist the poor through welfare programs has the potential to harm both the poor and the rich, eventually prejudicing all rights. Thus, as paradoxical as this may sound, governments, in some cases, protect the rights of the rich by *modestly* taxing them to support the poor. Taxation should, therefore, be seen as a necessary evil.[28]

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[27] Aquinas argues that life is so previous that it can be invoked to justify even theft. He writes: "If...there is such urgent and evident necessity that there is clearly an immediate need of necessary sustenance, if, for example, a person is in immediate danger of physical privation, and there is no other way of satisfying his need, then he may take what is necessary from another person's goods, either openly, or by stealth. Nor is this, strictly speaking, fraud or robbery." Thomas Aquinas, Summa Theologica, 11-11. Quoted in Virginia Held, "John Locke on Robert Nozick," *Social Research* Vol. 43, 1976. Thomas Hobbes appears to agree with Aquinas when he argues that "When a man is destitute of food, or other thing necessary for his life, and cannot preserve himselfe any other way, but by some fact against the Law; as if in a great famine he take the food by force, or stealth, which he cannot obtaine for money nor charity; or in defence of his life, snatch away another mans Sword, he is totally excused..." see Thomas Hobbes, *Leviathan,* 1968: 346. David Hume's position is not different from Hobbes'. For Hume, when individuals are in danger of starvation, then even legitimate property rights ought to be violated: "...The strict laws of justice (prohibiting private property) are suspended in such a pressing emergence, and give place to the stronger motives of necessity and self-preservation" In case of dire necessity, there is nothing "criminal or injurious" about ignoring conventional rules of private property. See Hume, *Enquiries Concerning Human Understanding*, 186-187.

[28] This point could be used to clarify the principle of minimal mutilation we discussed in Chapter two. Judges would review democratic decisions to pursue higher moral goals on the basis of whether that decision is required in order (a) to avoid a moral horror, or (b) ensure stability and security for the community in general. (b) would even pass muster by the genealogy test: Pursuing the higher moral goal would at the same time be maintaining the foundations of the Ethic of Respect. I owe this explanation to Wes Cooper. It is a shame the principle of minimal mutilation is absent in ASU: the principle seems to enhance the plausibility of his theory, though at the expense of making him less libertarian, if not non-libertarian.

Admittedly, Nozick could theorize my taxation as a "necessary evil" argument as a "minimum mutilation" of the four-level structure.[29] Accordingly, he might contend that taxing (and thus violating) 'minimally' the right of the rich is 'necessary' in order to achieve a higher moral goal. Indeed, this "minimal" taxation, as we saw in Chapter two, is consistent with Nozick's treatment of bequests and taxation in *The Examined Life*, where he argues that the bonds of concern for others justify mandatory taxation (TEL, 291). Also, as we shall see in Chapter 4, one might say that Nozick's treatment of bequests in TEL is invited by the idea he hesitatingly acknowledges in ASU that departure from the ethic of respect may be required in order to avoid catastrophic moral horror. In the case of bequests, the horror would be the expectation that unrestricted bequests would lead to ghastly poverty alongside immense wealth. In short, Nozick seems to have the wherewithal necessary to address my concern. The problem, however, is a familiar one: his four-layer structure and its principle of minimal mutilation as well as his inheritance law and its mandatory taxation all, arguably, look to be a betrayal of his libertarian principles. Particularly, the inheritance rule (a rule which justifies mandatory taxation) and the principle of mutilation (a principle which justifies violation of rights) appear to be anathema for the libertarianism of ASU in which taxation is theft, and infringement of right unacceptable. In short, both the four-level moral structure and the inheritance law are inconsistent with the version of libertarianism in ASU, in which only negative rights can be coercively enforced by the State. Given the fact that they undermine the fundamental tenets of libertarianism, to remain consistent, a libertarian Nozick would not see taxation as "a necessary evil" despite the fact that governments can use taxation as a means of protecting both the rights of the poor and the rich!

If libertarians think people's right important, then we should think it important enough to help people enjoy those rights. As we shall see momentarily, Nozick himself acknowledges that rights are meant to promote human life or meaningful life, to use his exact words. This claim is tantamount to saying that we help the poor live a meaningful life by helping them enjoy their rights. Once the poor enjoy their rights, the rights of the rich can be virtually safeguarded. Thus, welfare programs can be said to be innately tied to the notion of rights. If the cogency of my argument is accepted, then we can conclude that rather than welfarism and the Lockean rights being antagonists, libertarians should regard them as an amicable team, their union and relationship being the catalyst for respecting our (property) rights. Indeed, the next section contends that one cannot promote the Lockean rights and denigrate welfare programs.[30]

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[29] We discussed the four-level moral structure and its principle minimal mutilation in Chapter two

The Lockean "Siamese": The Lockean Natural Rights and the Natural Law

As we saw in Chapter two, in ASU, although Nozick embraces the Lockean rights, he unsystematically dismisses Locke's moral foundation, namely, the natural law, as philosophically unacceptable. While the Lockean rights are plausible in the sense that they are in concord with our firmest intuitions about rights, in opposition to Nozick, I will maintain that one can be committed to the Lockean rights without being a *fortiori* committed to rejecting positive rights or patterned theories. In short, I will contend that a commitment to the Lockean natural rights should not necessarily commit us to rejecting positive rights. To buttress this point, I will demonstrate that Locke, Nozick's purported philosophical progenitor, invokes the notion of natural right to defend both negative and positive rights. Thus, Nozick's rigid negative/positive right demarcation runs afoul of the Lockean theory of natural rights. On Locke's account, as noted above, natural rights are simply rights conferred on persons by laws of nature. He believes that without natural law, there can be no natural right either. Locke's theory of rights cannot, therefore, be understood apart from his view of natural law[31], a law which, as I aim to show, does not preclude, in and of itself, positive rights or patterned theories, but rather requires them.[32] Locke states in no uncertain terms that since the *raison détre* of property or rights is human preservation, a legislature is *legally* duty bound to see to it that the needy always have a right to the surplus of the rich (I, 42). The sentiments expressed here, furthermore, are elaborated at length in the *Second Treatise*: "The *first and fundamental positive Law* of all Commonwealths, is the establishing of the legislative power; as the first and the *fundamental natural Law*, which is to govern even the legislative itself, is *the preservation of the Society*, and of every person in it" (II, 134). From this passage, it is evident that Locke is endorsing the "welfarist" view that governments are justified in taking away some of the (surplus) property of the rich to give to the poor, irrespective of how the property came into being. Thus, Locke's account of individual rights can be said to be subordinate to an account of natural duty. This seems to suggest that, in Locke's view, the legitimacy of our surplus entitlements is always contingent upon the preservation of mankind. Locke can, therefore, be interpreted as holding the view that all property rights come unencumbered with implicit if indeterminate obligations (Ryan 1992: 156).

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[30] In my opinion, Nozick should renounce his 'overt' ASU libertarianism in favor of his post-ASU liberalism. I find the latter 'more' attractive: it falls between two implausible extremes: unmitigated egalitarianism and 'absolutist' libertarianism. More particularly, I find his four-layer moral structure with its principle of minimum mutilation extremely appealing. As we saw in Chapter 2, although the four-layer moral structure denies the assumption that libertarianism is the whole truth about moral constraints, it still deems it morally fundamental. With his endorsement of the four-layer structure, Nozick can now have his cake and eat it, too, so to speak. In other words, we can respect rights and violate rights *minimally*—in order to attain a higher moral goal—without any contradiction. In a future project of mine, I will vigorously defend Nozick's post-ASU liberalism.

[31] That said, I should indicate my awareness that Nozick's 'genealogical' underpinning for rights in *Invariances* is meant to show that Locke's theory of rights can be understood independently from Locke's view of natural right. Indeed, as we saw in Chapter two, Nozick's genealogical approach is clearly intended to answer ASU's great unanswered question about how natural rights are justified.

The political implication of Locke's theory of right, then, is that the state may from time to time properly intervene in the rights of citizens and may *even* compel its affluent subjects to do whatever will ensure the survival of all. Since Locke repeatedly and emphatically maintains that laws which seek to promote the preservation of mankind do not exceed the legitimate powers or function of the state, it is ironical that Nozick invokes Locke's theory of right to justify his repudiation of positive rights and patterned theories. It is more ironical given that the very same

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More specifically, Nozick of *Invariances* grounds the ethic of respect in the core of ethics, namely, mutually beneficial cooperation. This "core" of ethics is hypothesized as emerging by natural selection, as groups that constrained their behavior towards each other were better able to survive and reproduce. In short, Nozick's genealogical derivation of "natural rights" from evolutionary considerations about mutually beneficial cooperation—i.e., the rights of his Ethic of Respect— shows that Locke's theory of rights and his natural law are not inextricably linked. However, since ASU is devoid of this 'genealogical' underpinning for rights, and since this chapter exclusively focuses on ASU, I will ignore this difference between Nozick and Locke. Besides, this difference does not vitiate my thesis that Nozick's libertarianism justifies positive rights. As we discussed extensively in Chapter two, Nozick's other three layers, besides ethics of respect, can arguably be invoked to justify redistribution. For more on this, see Chapter two.

[32] Since negative rights prohibit forceful distribution, while positive rights mandate it, I shall cast the distinction between negative and positive rights as that between non-patterned and patterned conceptions of justice respectively. Thus, I shall treat positive rights as part of welfare rights.

section, from which Nozick quotes Locke with evident approval, contains portions specifically aimed at justifying positive rights. Nozick reproduces Locke's particular set of negative rights like this: "No one ought to harm another in his life, health, liberty, or possessions" (sect. 6) [of the *Second Treatise*] (ASU: 10). However, he *omits* the following important and decisive last words of that section: "Every one as he is *bound to preserve himself*, and not to quit his Station willfully: so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to *preserve the rest of Mankind*" (Emphases, Locke's). For the sake of brevity, I shall refer to this passage as the "preservation of mankind" passage. Since the passage Nozick quotes to defend his negative right theory is continuous of the "preservation of mankind" passage, Nozick could not have missed it. It is obvious that Nozick selectively quotes only those elements of section 6 of the *Second Treatise* which will fit his negative right libertarian thesis.

The need for Nozick's omission of the "preservation of mankind" passage should not surprise us, for he is fully aware that he *cannot* overtly build into his libertarianism the Lockean demand on us to preserve mankind in general without seriously undercutting his entitlement theory, according to which there is no demand whatsoever upon us to use our legitimate property to preserve the lives of others, (barring situations in which the Lockean proviso is brought into play. I discuss the Lockean proviso later in Chapter 4). Since the "preservation of mankind part" of Locke is ill-suited to the defense of Nozick's libertarian principles, a sympathetic interpreter might say it is "excusable" that Nozick disregards that part.

However, in deliberately ignoring this *crucial* side of Locke, a side that justifies a patterned theory/positive rights, Nozick seems vulnerable to the criticism that his conception of right is very un-Lockean (Ryan 1992: 156) and that "were Locke alive today, it is almost certain that he would be an opponent, not a friend, of Robert Nozick's political philosophy" (Held 1976: 170-175).[33] To 'extricate' himself from the criticism that he is un-Lockean, Nozick, arguably, needs to affirm his support of the Lockean natural right, by endorsing both "negative and "positive" sides of Locke. Since the doctrine of both negative and positive rights are tied to the Lockean conception of natural right, one might say that Nozick's wholesale endorsement of the Lockean natural right debars him from strictly dichotomizing between negative and positive rights.[34]

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[33] Nozick's denial of the existence of positive rights has spurred Virginia Held to contend that his philosophical precursor is not Locke but rather Robert Filmer. Thus, Held believes the content of ASU is substantially similar to that of Filmer's *Patriarcha*. (Held 175). However, I shall argue later that, contrary to appearance, Nozick's endorsement of the Lockean rights and the Lockean proviso commit him to being an anti-Filmerian.

Against my interpretation, the libertarian negative right theorist might argue that Locke's "preservation of mankind" passage simply enjoins us to preserve mankind *negatively* by refraining from harming ourselves as well as others. Since the thesis does not commit Locke and Lockeans to *positively* assisting others, the objection continues, Nozick is right in aligning the Lockean theory of rights solely with negative rights and duties. Indeed, G.A Cohen, for all his criticisms of Nozick's libertarianism, believes along with C.B. Macpherson, that Section 6 of the *Second Treatise*, (i.e.; the "preservation of mankind" passage) is congruous with negative duties of non-interference, but radically incompatible with positive rights: "In fact, II: 6 forbids people to harm others, or to deprive them of what they have produced for themselves, but it does not… lay down that, having succeeded in preserving himself, a person is obliged to set out working for the preservation of others, should such activity now be necessary and possible" (Cohen 1995: 190, for similar interpretation, see Macpherson 1962: 199-220). In short, Cohen and Macpherson interpret Locke as holding the view that natural rights are tantamount to negative rights. If their reading of Locke is correct, then one might say Nozick is absolutely justified in analyzing the Lockean natural rights in terms of negative rights.

At a reasonably basic, intuitive level, of course, it seems accurate to interpret the "preservation of mankind" passage, as the duty of non-interference in the face of a society where everybody is materially prosperous. However, in an actual society, such as ours, where at least some are in destitution, this interpretation cannot withstand critical scrutiny. To begin with, it sounds intuitively implausible and extremely bizarre to say, as Cohen and Macpherson do, that we can preserve a person starving to death by merely refraining from harming that person. In fact, it appears linguistically odd to define preservation in terms of inaction, or of negative rights and duties, for the verb "preserve" is an active word that requires a person to positively *do* something. If you preserve meat, you take action to save it, or protect it from damage; you do not simply preserve it by sitting down and not "harming" it! Relating this to our argument, we can preserve a person starving to death by actively providing the person with the things necessary to keep him/her alive. Thus, Locke cannot plausibly and possibly be read as holding that we are not required to *positively* aid the needy. Indeed, this "negative" interpretation of the passage under consideration is an extreme and unfortunate distortion of what Locke actually says and means: Locke makes it abundantly clear that we owe "relief and support to the distressed" (II, 70).[35]

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[34] It might be replied that Nozick would throw away his Lockean mantle rather than betray his commitment to negative rights. However, I will shortly argue that his "Lockean mantle" is the key argument in favor of his account of justice in general. Consequently, if Nozick were to throw away his Lockean mantle, his account of justice would lack coherence.

There are numerous passages in his other political writings that lend credence to this 'welfarist' interpretation. I want to call attention to a series of passages throughout Locke's other mature works in which he argues in favor of redistributivism. For example, in his *Essays on the Law of Nature* (ELN), Locke unequivocally asserts that we are all duty bound to console our distressed neighbors, to give "relief" to "one in trouble," and to "feed the hungry" (ELN, 195). He reaffirms this natural right to food and sustenance in his *an Essay Concerning Toleration* (ECT) when he maintains that it is a "virtue and every particular man's duty" to relieve "with an alms the poor" (ECT, 182). All of this seems to rebut the libertarian interpretation that Locke's theory of rights is devoid of positive rights. Indeed, if rights in Locke were equivalent to negative rights, and if negative rights, as libertarian natural right theorists never get tired of reminding us, do not conflict, then conflict of rights should not arise in Locke's system. However, Locke devotes the entire section 183 of the *Second Treatise* to explicitly discussing conflicts of rights, contending that in cases of a collision of rights, the rights of those who are well off, in accordance with the law of nature, should always "give way to the pressing and preferable Title of those who are in danger to perish without it" (II, 183). It is evident that in this passage, Locke is claiming that the right of the needy can, and indeed *should* justifiably override the right of the affluent, a claim which palpably refutes the thesis that Locke's natural right is antithetical to positive rights and duties. This fact alone, one might reasonably conclude, is sufficient to affirm that Locke sees natural right as more than just non-interference by others.

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[35] Cohen concedes that "there is a reference to 'the preservation of the Community' in the first sentence of II, 149" (Cohen 1995: 190, fn54). However, he insists that it is up to only the legislative body to carry out this duty because individuals or citizens do not have any non-contractual duty to preserve anyone. I think this interpretation is extremely implausible since the legislatives are mere representatives of denizens. The legislative is empowered by the citizens to ensure the preservation of all. The rights of legislatives are merely the sum of its individuals' rights. It follows that if citizens have no positive duty to assist the poor in the community, then the legislatives do not have such a duty either.

It must also be emphasized that since Locke acknowledges that the right of the poor can legitimately override the right of the well off, and since rights which are absolute are not overridable, he cannot be ranked among absolutists. Indeed, it is a contradiction in terms to say absolute rights can be overridden. As Alan Gerwith rightly points out "a right is absolute when it cannot be overridden in any circumstances" (Gerwith 1984: 92). This suggests that the Lockean rights are not absolute, as natural right libertarians, such as Nozick, would have us believe. Some libertarians, notably Tibor Machan, are worried that if (Lockean) natural right theorists acknowledge the possibility of clash of rights, then the choice between conflicting rights will be left "entirely arbitrary" (Machan 1989: 197). This, they are convinced, will lead to arbitrary encroachment upon legitimate rights. However, this reasoning is a *non sequitur*. Just because there is a possibility of clash of rights does not automatically mean that the choice between the conflicting rights will be arbitrary. If one believes, as Locke does, in the hierarchy of rights, then the "arbitrariness" charge evaporates. Locke places rights in a hierarchy of importance, with the right to life always on top. This being the case, in a Lockean society, resolution of rights will not be necessarily arbitrary. Locke, as we have repeatedly seen, believes that the right to life is more important than the right to absolute property. It follows that when the right to life and the right to absolute property come into conflict with each other, Locke would predictably say that the latter *obviously* ought to give way to the former. In other words, in Locke, as S.B. Drury eloquently puts it, "the right to property did not threaten the right to life, but ensured it. Where the right to property threatens the right to life, Locke would settle the matter in favour of the right to life. After all, the latter is primary, whereas the former is meant to serve it" (Drury 1982: 34). All this clearly suggests that a commitment to a natural right theory should not necessarily commit one to rejecting positive rights on the grounds that positive rights bring about *arbitrarily* encroachments upon negative rights. Indeed, since Locke believes that the right to life provides the basis for a theory of property rights, he seems to hold that negative and positive rights are peacefully coextensive with each other.

If my analysis is correct, and if Nozick continues to accept Locke's natural rights in their totality, then, arguably, he would have a hard time maintaining his sharp distinction between negative and positive rights or, his favorite terminologies, between patterned and non-patterned theories. Indeed, the natural law roots of Locke's theory of rights makes it extremely difficult, if not impossible, for Nozick to accept wholeheartedly Locke's theory while maintaining the positive-negative right distinction without seriously damaging his theory of right upon which his libertarianism rests. While this argument does not necessarily refute Nozick's claim that positive rights do not exist, it, at least, weakens his contention that the Lockean natural rights and positive rights are mutually exclusive. If they were, Locke, Nozick's acclaimed philosophical ancestor, couldn't be a proponent of both natural right and a positive right!

Natural Rights as Kantian Side-Constraints

Presumably, Nozick would react to the above objection by contending that he invokes Kant, not Locke, to explain why the Lockean rights should be understood as overriding negative side constraints upon action. Thus, he might insist that he is not logically bound to incorporate Locke's "preservation of mankind" passage, with its accompanied positive right thesis, into his enterprise. I readily admit that the Nozickean conception of individual rights takes the form of Kantian side constraints, (i.e. as a moral bar to our actions). That admitted, I will argue that a commitment to this Kantian view carries with it no commitment to the libertarian negative or absolute right thesis. Nor does it carry with it a rejection of redistributive taxation and modern welfare states. Thus, my overall conclusion will be that just as Nozick cannot invoke the authority of Locke to defend his absolutism, he cannot also successfully invoke the authority of Kant to defend his enterprise.

Famously, Nozick employs Kant's Second Formulation of the Categorical Imperative namely, the "Formula of Humanity as an End in Itself" as his sole reason for holding the Lockean rights to be absolute. The Second Formula of the Categorical Imperative simply enjoins us to treat men as ends in themselves and never as only a means to an end: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end" (Kant, in Paton, 1948: 91). Henceforth, I will refer to Kant's Second Formula of the Categorical Imperative as the means-ends principle, for short. Nozick believes that Kant's dictum of treating persons as inviolable ends is equivalent to treating individual (Lockean) rights as inviolable or absolute. In short, the means-ends principle and Nozick's absolute conception of rights are held in tandem. In making this claim, I am registering my disagreement with commentators who see the invocation of Kant's Second Formula as providing some sort of a *foundation* for the Nozickean rights.[36] While it is correct to say that the Kantian means-ends principle is the fundamental building block of Nozick's entitlement theory, I think it is a categorical mistake to say that Nozick regards the principle as providing a foundation for his theory of rights. As we noted earlier, Nozick himself unabashedly acknowledges in ASU that in a strict, deductive sense, his theory of rights is without foundations. And, again as we saw, in his *Invariances*, Nozick attempts to offer an 'evolutionary', not Kant's means-ends principle, foundation for his libertarianism.

It should be stressed that Nozick does not consider himself Kantian because he believes his theory of right is founded upon the Kantian side constraints view or the means-ends principle, as some commentators would have us believe. Rather, he believes that his theory of side constraint is purely Kantian in the sense that it depicts rights as constituting an absolute barrier on what people may do to one another. This reading of Nozick is supported by his claim that "side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable" (ASU: 30-31). The essential point Nozick is making in this passage is that to treat individuals as ends in themselves is tantamount to treating their rights or properties as absolute and inviolable. I will take up this issue further in Chapter 5, where I discuss the connection between self-ownership and Kantianism about the person.

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[36] A.J. Simmons, for example, writes: "A familiar example of a Lockean project with Kantian foundations can be found in Robert Nozick's writings on moral and political theory. Nozick's avowedly Lockean enterprise… insofar as it has explicit moral foundations at all, has straightforwardly Kantian ones" (Simmons 1992: 43 fn73, See also Wolff 1991: 27-28).

The doctrine of rights as side constraints stands in opposition to the teleological/consequentialist theory of rights or what Nozick refers to as "utilitarianism of rights" (ASU: 28), according to which individual rights can be justifiably overridden for the sake of public welfare or social utility. The centerpiece of Nozick's attack on the consequentialist theory of rights is the charge that consequentialists ignore the fact that we are separate and distinct individuals with absolute rights to our entitlements. In fact, in ASU, he relies heavily on the thought that we are separate individual in order to dismiss all patterned/consequentialist conceptions of justice.

> The moral side constraints upon what we may do, I claim, reflect the fact of our separate existences. They reflect the fact that no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall social good. There is no justified sacrifice of some of us for others. This root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlines the existence of moral constraints (ASU: 33).

It is not wholly clear what the separateness of person's thesis amounts to, although both Nozick and Rawls rely heavily on the thesis in arguing against utilitarianism. That said, we can glean from the above passage that Nozick seems to hold that because there are separate individuals with separate lives, there should be no moral outweighing of one life by another.[37] In short, Nozick believes respecting people's histories and entitlements is a crucial part of respecting their separateness. This being so, he contends that both Rawls' DP and utilitarianism violate this thesis of the separateness of individuals, which he claims to be derived from the Kantian means-ends principle. This charge against Rawls seems ironic given that Rawls invokes the *same* thesis of separateness of persons to indict utilitarianism. To be sure, Rawls believes the "separateness of persons" is one of the most fundamental moral facts about human beings. Rawls insists that the doctrine of utilitarianism is indefensible because "utilitarianism does not take seriously the distinction between persons" (1971: 27). One can, therefore, say that at least both Nozick and Rawls agree that any acceptable theory of justice should not ignore the distinctness of persons. More interestingly, both are convinced that their theories are motivated by a Kantian view of morality. To see this, compare these two quotes from Rawls and Nozick respectively: "The difference principle explicates the distinction between treating men as a means only and treating them as also as ends in themselves (1971: 180). "Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means" (ASU: 30). It seems clear, then, that both Rawls and Nozick seek to place themselves within the Kantian tradition of political philosophy[38]. That is, both concur that the doctrine of separateness of persons requires that individuals be treated as ends in themselves.

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[37] However, it is not clear why treating persons as distinct individuals with distinct lives should not involve moral outweighing of one life by another, given that morality can, and indeed should, be construed as a principle for resolving interpersonal conflict (Cf. Dennis Mckerlie, "Egalitarianism and the Separateness of Persons", *Canadian Journal of Philosophy*, 18, 2, (June 1988) pp. 205-206). Surely, resolving interpersonal conflict sometimes requires balancing conflicting interests against one another, and the interests to be balanced are obviously the interests of distinct individuals with distinct

The bone of contention between Rawls and Nozick, I believe, is their different conceptions of what being treated as an end entails. For Rawls, people are treated as ends in themselves by reducing inordinate inequalities that disadvantage others. Contrariwise, Nozick holds that treating persons as ends requires granting them full rights over their *legitimate* entitlements. Any system that does not legally recognize exclusive rights of ownership, on Nozick's reckoning, violates Kant's maxim to treat people always as ends in themselves. Thus, if part of my rightful property is coercively taken away from me and given to the poor, then, from Nozick's perspective, I am being treated as sheer means. More generally, those who have their

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lives. This seems to suggest, contrary to Nozick, that some distinct individuals will occasionally have interests that morally outweigh the interests of others.

[38] This spurs Jean Hampton to query, "which one legitimately deserves the name 'Kantian?" (Hampton 1997: 148).

holdings taken from them are mere *means* to the benefit of those who are less well off. I will return to this point in Chapter 5.

In sum, Nozick believes that any doctrine which is teleological in nature is incompatible with his doctrine of side constraint, since in order to realize that goal or telos, some people's rights or liberty have to be inevitably curtailed. His doctrine of side constraint is therefore said to be radically deontological or anti-consequentialist (Hailwood 1996: 10). The so-called absolutism or stringency of Nozick's moral side constraints consists in the fact that one cannot justifiably violate a single right even when doing so would minimize violation of rights in society as a whole. It follows that the doctrine of "the lesser evil" has no place in Nozick's theory of rights, as explicated in ASU. For instance, killing one man in order to save lives of millions from death is "deontologically" wrong since the person killed is being used as sheer means to an end. In short, boundary or border crossings (a metaphor Nozick uses to describe violation of rights) are morally impermissible under the side constraint view even for the purpose of minimizing right violation (ASU: 29). Simply put, on Nozick's account of rights, it is impermissible even when the using of many innocents can be prevented only by using few other innocents.

Given Nozick's insistence that treating persons as ends in themselves, never as mere means, is so important morally and politically, one might legitimately question why the obligation not to allow (to prevent) innocent persons from being so treated isn't just as important as the obligation never to treat them that way oneself. In other words, why doesn't Nozick *explicitly* defend a kind of "Kantian consequentialism" which directs us to "minimize the number of 'net usings' of innocent persons"? Or better yet, if it is so wrong to use a person as a mere means, then why is it less wrong to allow one to be so used, one may curiously ask?[39]

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[39] The standard deontologist answer is that in using one person to prevent many people from being used, one is *directly responsible* for using that person; whereas when one (merely) allows many innocents to be used, one is at most *indirectly responsible* for this outcome. Thus, for unmitigated deontologists, including Nozick, it is morally worse to inflict harm on an innocent (or otherwise use her as a mere means) than it is to allow an innocent to be so used or to fail to prevent it. The deontologist argument is somehow analogous to the Killing/Letting Die Asymmetry Principle. Some philosophers, notably James Rachels, have cast doubt on this principle in the discussion of the morality of active euthanasia. Given that, according Rachels, the death of a human being occurs whether she is killed or allowed to die, there is no moral consideration to support the Killing/Letting Die asymmetry. Thus, Rachels would reject the deontological claim that it is morally worse to use a person as a mere

Given the maximum importance that Nozick accords individual rights and liberty, coupled with the considerable emphasis he puts on avoiding and prohibiting rights violation in ASU, some critics are quick to point out that consistency requires that his side constraint view allows for a minuscule amount of boundary crossings if the end result is a maximization of liberty and minimization of rights violations in the world at large. For example, in his article "Why Libertarianism is Mistaken," Hugh LaFollette contends that libertarianism is guilty of internal incoherence because it fails to maximize the very concept, namely, liberty lying behind it (LaFollette 1978). According to LaFollette, libertarianism is self-refuting because "negative rights fail to protect individual liberty the way the libertarian suggests. Since the protection of liberty is the express purpose of these libertarian rights, the theory fails" (Ibid. 196). In a similar vein, in inveighing against Nozick's libertarian capitalism, G.A Cohen sardonically and rhetorically asks: "How is libertarian capitalism *libertarian* if it erodes the liberty of a large class of people?" (Cohen 1995: 36, his emphasis). In effect, Cohen, with LaFollette, accuses libertarians in general, and Nozick in particular, of inconsistency and self-refutation on the grounds "that 'libertarian' capitalism sacrifices liberty to capitalism" (Ibid. 37).

However, the plausibility of the above criticisms rests on a misunderstanding of Nozick's libertarianism. Cohen's and LaFollette's argument, therefore, cannot stand as a fair criticism of Nozick's enterprise, since as we have already noted, Nozick does not define his libertarianism in terms of maximization of liberty or rights, but as side constraints. In short, they mischaracterize Nozick's libertarianism. To clarify Nozick's position, we can distinguish two sorts of liberty or rights:

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means than it is to allow an innocent to be so used. While, I find Rachels' argument plausible, let me hasten to add that libertarians do not defend the view that active euthanasia is morally worse than passive euthanasia by invoking the Killing/Letting Die Asymmetry Principle. Indeed, libertarians would dismiss the entire debate about morality of euthanasia as a non-starter. For libertarians, a competent, informed and autonomous person has a right to make her own decision about whether the life her future holds in prospect is worth living. Thus, the decision to be allowed to die or be killed should rest exclusively with her. The doctrine of self-ownership, a doctrine to which libertarians subscribe, tells us to allow rational agents to live their lives according to their decisions, if they uncoercively choose to die, *even if they are healthy*, they should be allowed to do so and even should be assisted in carrying out their decision. To stop autonomous individuals to terminate their lives either by themselves or by their doctors is to act paternalistically towards those individuals. I will return to this point in Chapter 5, where I will discuss the doctrine of self-ownership and its implications for the libertarian theory of rights.

engendered and established liberty. An "engendered" liberty is a consequentialist view, in which rights are *built into* the desired end state. By contrast, an established liberty is a deontologist view in which rights are a *constraint* on every action irrespective of the consequences. With this distinction in place, it is reasonably clear that Cohen and LaFollette operate with a notion of engendered liberty, a notion which Nozick would definitely not accept. In fact, since Nozick adamantly maintains that rights are to be seen as side constraints, not as goals to be maximized, their criticism substantially begs the question against him.

It is crucially important to note that although Nozick's theory of rights is a *liber*-tarian theory, it is not primarily concerned with the maximization of liberty or rights.[40] Of course, I do not mean to imply that liberty is unimportant in Nozick. Without a doubt, he believes there is an equal right to liberty. That is, he can be said to be egalitarian with respect to rights to liberty. In this formal sense, there is an *established* (side constraint), symmetrical liberty. Put differently, Nozick's libertarianism can be seen as a maximum consistent equal liberty account, if one understands the liberty he cares about as established, as opposed to engendered, liberty. While Nozick makes liberty the basis of the rights he ascribes to human beings, he will *not* try to explain the ascription of rights by saying that these rights increase individual liberty, where liberty is defined so as to vary with the total number of actions that the individual may rightfully perform.

Nozick's established conception of liberty, so interpreted, is congruent with his argument against the doctrine of inalienability of rights, with its corollary paternalism. If liberty were social goal to be maximized, then it would not be permissible for individuals to use their liberty to alienate or abdicate their liberty or rights, since doing so would diminish the social goal. Nozick rejects the doctrine of inalienability of rights on the grounds that he believes the doctrine inevitably leads to paternalism. That is, if my rights were inalienable, they would function *paternalistically* against me: *"You have to have rights to promote social good, whether you like it or not"!* Thus, given that the engendered liberty leads to paternalism, and given Nozick's *non*paternalism, he would dissociate himself from Cohen's and LaFollette's "engendered" liberty. Their argument would be damaging to Nozick if Nozick regarded liberty as a social goal to be maximized. For example, their argument would constitute a powerful objection against J.S. Mill who defines liberalism/libertarianism in terms of maximization of liberty. Because Mill sees liberty as a general value to be maximized, he is forced to argue in favor of inalienability of rights, including the right to enslavement. Indeed, Mill condemns slavery being voluntary or mandatory on the grounds that it is an abdication of individual liberty, which, from his standpoint, constitutes diminution of the social goal or good. He writes: "the principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom" (Mill, *On Liberty*: 172).[41] Given Cohen's and LaFollette's engendered conception of liberty, their objection would be appropriate and devastating if directed against Mill and other philosophers who construe liberty in terms of maximization of liberty. But their objection, as I have contended, does not directly affect Nozick's flavor of libertarianism.

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[40] Given that libertarianism is derived from the Latin word, *libertus* meaning liberty, it should come as no surprise that many critics construe Nozick's libertarianism in terms of maximization of liberty.

It should also be pointed out that while Nozick believes the doctrine of inalienability of rights and paternalism go hand in hand, and thus a rejection of one entails a rejection of the other[42], he cannot be aptly ranked among *anti*paternalists. I am bringing this point up because some commentators have erroneously associated Nozick's name with unmitigated anti-paternalism. A.J. Simmons, for example, writes: "Nozick's *strict antipaternalism* has included a blanket rejection of inalienable rights" (Simmons 1993: 101, italics mine). In my opinion, the tag "strict antipaternalism" as a characterization of Nozick's position is wholly inaccurate. If a philosophical position is named antipaternalistic, an idea that immediately suggests itself is that this position condemns paternalism; that is against—anti—paternalism *as such*. Now if that were the case with regard to Nozick's position, as a matter of consistency, he would have had to support laws or regulations protecting individuals from paternalism altogether. But then such laws or regulations would stand in the way of an individual's right to do to himself anything, a state of affairs unacceptable to Nozick, of course. Accordingly, to be consistent concerning the issue of paternalism, Nozick cannot adopt an antipaternalistic position. Nozick himself is aware that only by settling for a *non*paternalistic position can he be a consistent libertarian. He therefore describes his position (on paternalism) as nonpaternalistic, as opposed to anti-paternalistic. For example, in rejecting Locke's inalienability of right to life, Nozick writes: "My *nonpaternalistic* position holds that someone may choose (or permit another) to do to himself *anything*, unless he has acquired an obligation to some third party not to do or allow it" (ASU: 59, first italics mine). Nozick's essential point is that paternalism is condemnable provided it is forced upon a person since then it violates that person's right not to be coerced. Nozick's nonpaternalism, unlike antipaternalism, seems to sit comfortably with his Kantian side-constraints view, as opposed to a utilitarianism of rights view. Thus, just as in ASU Nozick does not allow rights violations even where such would be necessary to *minimize* rights violations overall, he does not allow paternalistic interferences even where such would be necessary to minimize paternalistic interferences overall. In short, since Nozick endorses self-imposed paternalism, he would reject Simmons' antipaternalistic reading (as inconsistent with individual liberty).

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[41] Despite the apparent unpopularity of Nozick's notion of liberty, consistency seems to be on his side. For if I am free, but can't use my freedom to unfree myself, then, I cannot said to be free. In short, consistency commits us to concurring with Nozick that liberty requires that *we be free not to be free.* Ironically, this claim is consistent with J.S. Mill's own definition of liberty: "liberty consists in doing what one desires" (Ibid. 166). Thus, if one's fervent desire is to unfree oneself, then why not one be allowed to do so? In preventing one from using one's freedom to abdicate one's freedom, one is no longer free! In short, J.S Mill's forced-to-be-free-argument is inconsistent with the principle of freedom and liberty!

[42] Kant famously argues against paternalism. According to him, paternalism is the chief rival and impediment to individual liberty. Yet Kant also famously contends against alienability of one's right to life. Presumably, Nozick would say that since the doctrine of inalienability of rights and paternalism are indissolubly intertwined, Kant cannot "love the one and hate the other".

The Means-ends Principle, Paternalism and Nozickean Negative Rights

Having tried to exonerate Nozick from some of his critiques, I would like to argue that Kant's second version of the categorical imperative or means-ends principle does not imply that people are entitled to everything they legitimately produce or acquire, as Nozick would have us believe, sometimes! Indeed, it is possible and plausible to defend rights consistent with Kant's principle, yet not take these rights to be absolute. One can plausibly argue that Kant himself never takes the means-ends principle to entail inviolability or absolutism of rights, and thus Nozick application of Kant's categorical imperative is hugely misguided. Indeed, as we shall shortly see, Kant believes the means-ends principle sometimes entails redistributive taxation. It is Kant's considered or mature view that the state has a moral responsibility to ensure the well-being of its citizens. This claim is textually well grounded:

> The supreme commander has the right to impose taxes upon the people for their own preservation, e.g. for the *care of the poor*, for *foundling hospitals* and *church.* Kant explicitly attributes to the state as supreme proprietor of the land of the authority "to levy land taxes, excises, and customs or services" as well as "the right [as] supreme commander to administer the national economy, finances, and police.[43]

Some interpreters of Kant as a pure capitalist have adamantly insisted that Kant's concern about civil stability compelled him to support taxation *only* meant to ensure social cohesion. Thus, they believe the passage above does not commit Kant to endorsing redistributive taxation in general (Jeffrey Murphy 1970). However, this reading of Kant is tenuous at best. While it is true that the question about social stability preoccupies Kant, he makes it abundantly clear that sanctity of human life, not stability of social life, primarily demands that governments ensure the preservation of "those members of the society who cannot do so themselves" (ibid. 149) by taxing its affluent citizens. Indeed, in the *Rechtslehre,* where Kant explicitly argues in favor of redistributive taxation, he does not link his argument there with social order. In other words, he does not say that redistributive taxation is justified because it ensures social order. Rather, Kant eloquently offers a contractarian justification for redistribution: Rational individuals enter into civil society in order to obtain the necessary protection and care needed for their existence. This implies that individual agents also have the obligation to provide for the continued existence of others via taxation (Dodson 2003). In short, Kant constructs a contractarian argument for redistributive taxation by appeal to the general will:

> The general Will of the people has united itself into a society in order to maintain itself continually, and for this purpose it has subjected to the internal authority of the state in order to support those members of the society who are not able to support themselves. Therefore, it follows from the nature of the state that the government is authorized to

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[43] Immanuel Kant, *Metaphysical Elements of Justice,* trans. J. Ladd (Indianapolis: Bobbs-Merrill, 1969: 92)

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> require the wealthy to provide the means of sustenance to those who are unable to provide the most necessary needs of nature for themselves (Ibid. 93).

In a nutshell, Kant believes rational agents would ensure their survival through the state; therefore, the general will unites all for economic security of all. It should be stressed that Kant equivocally argues that this duty to assist the poor is *strict* or *perfect*, in the sense that it is *mandatory*.[44] In other words, the obligation to the needy is not a matter of mere charity; it should be *compulsorily* enforced through the state. To corroborate this claim, let me quote him one more time:

> The nature of the state thus justifies the government in compelling prosperous citizens to provide the means of preserving those who are unable to provide the means of preserving those who are unable to provide themselves with even the most rudimentary necessities of nature…the state has a right to make them [the prosperous citizens] contribute their share to maintaining their fellow citizens. …The contributions should not be purely *voluntary* (for we are here concerned only with the *rights* of the state as against the subjects), they must in fact be compulsory political impositions (Ibid, 149-50).

Some proponents of Kant as an anti-welfarist, though grudgingly conceding that this passage supports social welfare legislation, bite the bullet and dismiss the passage as not "consistent with his general theory" (Murphy 1970: 144-145, Williams, 1983: 196-198). Although they do not tell us what constitutes Kant's "general theory", they intimate that Kant's repudiation for paternalism is inconsistent with redistribution through taxation. Commenting on the above quoted passage, Howard Williams pointedly asks: "Does not this reflect a strong paternalistic attitude which elsewhere he [Kant] strongly rejects?" (Williams 1983: 197). Williams' rhetorical question is clearly motivated by his conviction that one cannot consistently endorse welfare programs and castigate paternalism at the same time. Since Kant is famous for his vehement rejection of paternalism, William insists that he is committed to rejecting social welfare legislation. In arguing against Singer's claim against libertarians that the affluent have the obligation to mitigate absolute poverty, John Kekes writes: "Those willing to use their critical faculties will notice that most people in absolute poverty are not small children and to think of them as such is a crass paternalistic insult" (Kekes 2003: 120). Thus, Kekes, like Williams, is convinced that governments act paternalistically by helping those below the poverty line. Indeed, if it can be proven beyond doubt that giving people welfare assistance is tantamount to treating them like children who are incapable of making rational choices, as Kant believes paternalistic governments treat their citizens, (ibid. 74) then, of course, Kant's argument against paternalism would debar him from endorsing welfare legislation. Or better yet, if paternalistic governments treat *adult* welfare recipients like children who cannot govern themselves, then one might plausibly maintain, with Nozick, that tax-based welfare programs are at odds with Kant's means-ends principle.

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[44] Kant's argument suggests that the so-called imperfect duties don't really absolve us of our ethical obligations. They are 'imperfect' duties not in the sense that we are not required to fulfill them. Rather, they are 'imperfect' in the sense that they succumb to perfect ones in cases of conflict.

William's, Murphy's and Kekes' argument gains its plausibility from the unspoken assumption that people voluntarily bring poverty upon themselves. This being so, they automatically assume that all social welfare programs are paternalistic. It is this assumption that I would like to take to task. To associate social welfare legislation with paternalism, I believe, is to grossly misconstrue the cause of poverty and the purpose or function of welfare programs. There is no gainsaying the fact that welfare programs are primarily designed to assuage the economic plight of the needy, and to enable them to ultimately gain their independence and autonomy. This means that the welfare assistance that the needy receive is supposed to be ephemeral.[45] Without welfare programs, those who are extremely wealthy may use their wealth as an instrument of molestation and as a means of getting the poor to submit to their whims and caprices. Since social welfare policy basically aims at reducing radical inequality that might translate easily into unwarranted political influence, coupled with the fact that it, in the long run, minimally equips the otherwise needy with self-determination, one might say that Kant's means-ends principle would, if anything, support *minimal* welfare programs.

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[45] Of course, there are some welfare beneficiaries who abuse the system by choosing to remain permanently on the program. This fact has motivated some libertarians to dismiss welfare programs as a failure. For example, Edward Feser opines: "the history of government-run social welfare programs in the United States is largely a history of failure: *Trillions* of dollars were spent on such programs between the advent of the Great Society in the 1960's… and poverty among the underclass only got worse and more entrenched" (Feser 2003: 27). Welfare programs, he continues "have not radically increased equality or eliminated poverty. Indeed, what we have seen instead is the creation of a permanent "underclass," a *cycle* of poverty associated with a culture of illegitimacy, drug addiction, and crime that is passed along from generation to generation" (Ibid 73). However, this will hardly do as an argument against welfare legislation, since we cannot condemn an institution just because some people have abused it. Saying that we should abolish welfare programs because some welfare recipients have behaved badly is analogous to the claim that we should abolish the institution of marriage and the family because some spouses and parents have behaved badly! The critique just shows that we should be suspicious of some welfare recipients who are permanently dependent on welfare programs. It does not, however, invalidate the system itself.

Furthermore, we can dissociate paternalism from welfarism by contending that paternalistic governments always act *against* the will of the people. Indeed, the distinctive feature of paternalistic governments is the imposition of their conception of the good on their *unwilling* citizens (Cf. Rosen: 1993, 189). By contrast, "welfarist" governments do not *coerce* citizens into receiving welfare assistance. Nor do governments dictate to welfare recipients how exactly they should spend their money and rule their lives. Thus, Kant could plausibly be interpreted as holding that rulers have a *non-paternalistic* duty to put the poor into positions where they can construct their own goals. Rulers are not required to impose their goals on the welfare beneficiaries. Kant repudiates paternalism because it involves the imposition of a conception of happiness on one who does not necessarily accept it. Given that happiness, according to Kant, is the sum of the satisfaction of one's desires and that desires are subjective, all conceptions of happiness as the good are purely subjective and not objective. Hence, their imposition on persons is despotic or paternalistic. However, redistribution through taxation does not impose a conception of happiness on anyone; instead, it merely secures the basic conditions of justice within which persons can pursue their own conception of happiness. In short, governments, through taxation, are morally required only to uncoercively provide the poor with the resources needed to achieve their goals. The simple fact that those already on welfare programs can willingly opt out anytime they choose to is sufficient to sever the connection between paternalism and welfarism.

Predictably, the libertarian would object that I have not located the true source of his concern. The issue, he might say, is not about welfare recipients but it is about those being "taxed" to help the recipients.[46] That is, the affluent citizens who are "forced" to help the poor through taxation are treated as "children" who do not know how to spend their own money. Thus, governments act paternalistically by implying that the rich are not capable of deciding on whom they should give their money to. However, it is not clear how limiting ownership rights by taxation in order to increase effective options for those who lack material resources constitutes paternalism. Besides, the plausibility of this argument rests on the tacit assumption that the state unjustifiably takes something from the property owners and gives it to the poor. However, for Kant, regardless of what the laws of the land, and the rules of our social structure, property owners unwittingly acquire their property unjustly. Kant argument implies that, in reality, there is no such thing as just acquisition. As he puts it:

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[46] Professor Bruce Hunter expressed this concern during my doctoral candidacy oral examination.

> Although we may be entirely within our rights, according to the laws of the land and the rules of our social structure, we may nevertheless be participating in general injustice, and in giving to an unfortunate man we do not give him a gratuity but only help to return to him that of which the general injustice of our system has deprived him. For if none of us drew to himself a greater share of the world's wealth than his neighbour, there would be no rich and no poor. Even charity therefore is an act of duty imposed on us by the rights of others and the debt we owe to them (Ibid. 194).

In short, in depriving others of the means of sustenance, we inevitably do them injustice. This being the case, even acts of charity are not meritorious; they merely restore to others what is rightfully theirs (Dodson 2003: 530). Since the property of the rich is 'inherently' unjust, governments cannot be said to act paternalistically by forcing the rich to return their ill-gotten property to the poor. It cannot be up to property owners to decide what, if anything, they wish to donate to charity and other good causes, since the property is not their bona fide property. If the argument developed is cogent, then Kant's anti-paternalistic views and his claim that rulers are duty bound to provide the means of preserving the needy can sit coherently together. Thus, Kant's anti-paternalism does not commit him to rejecting redistributive taxation, as some libertarians would have us believe.

Indeed, Kant's insistence that governments should ensure the preservation of the needy has the presupposition that we sometimes treat the poor as means by not preserving them through taxation.[47] This seems to suggest that the means-ends principle and taxation or welfare programs are not mutually exclusive in Kant. Thus, we are led to the conclusion that although living in the eighteenth century, Kant could not have had any conception of a redistributive welfare state in the modern sense of the word, the kind of state he envisages may be, in principle, compatible with some sort of redistributive welfare states. Thus, one might say that were Kant alive today, he would be a supporter of the establishment of fairly extensive welfare state interventions financed through redistributive taxation. If this claim is right, then Nozick cannot coherently align Kant's means-ends principle with his inviolability and absolutism thesis. Indeed, the above argument gives credence to the thesis that the adoption of end-state principles of justice is not, in and of itself, inconsistent with viewing rights as Kantian side constraints. Thus, taxation and patterned theories should be unobjectionable even on Nozick's Kantian grounds. Kant believes that human life is so intrinsically valuable that "the state has a right to make it a duty for the people not to let them perish knowingly" (Ibid. 150). This is sufficient to demonstrate that Kant, congruent with Locke, sees the right to life as encompassing not only the negative right not to be killed, but also the welfare right to those things necessary to sustain one's life.

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[47] I will have more to say about this issue in Chapter 5, where I discuss the relationship between self-ownership and Kantianism of the person.

It might be replied that my 'welfarist' reading of Kant is incompatible with Kant's own Morality/legality distinction. Admittedly, Kant contends that morality is an entirely inner matter: i.e., Moralität in the narrow sense. Since Kant insists that the inner source of morality is the only source of morality there is, he is committed to saying that moral duties cannot legitimately be enforced externally. Indeed, for Kant, the state is in no position to "invade" the inner lives of citizens and so must be completely indifferent to their inner attitudes. And when Kant says "no external lawgiving can bring about someone's setting an end for himself (because this is an internal act of the mind)" (Kant Rechtslehre: 239/64) he seems to be concurring with the anti-welfarist libertarian that it is impossible to impose duties of virtue upon the rich.

While Kant's Morality/Legality distinction seems to contradict his claim that the state can successfully "coerce" its citizens to help the poor, in my opinion, the contradiction is only apparent. Kant divides *The Metaphysics of Morals* into the doctrine of *Recht* (Justice) and the doctrine of *Tugend* (Virtue). *Recht* or Justice concerns external relations among persons, the locus of which is property rights. Since they involve external relations, duties of justice can appropriately be enforced through the coercive power of the State. *Tugend*, or virtue, on the other hand, concerns the inner dispositions and setting of ends, which cannot be coerced. Given this distinction, there is no real contradiction in arguing that the state is duty bound to insure that all members of the political community receive the basic means of subsistence, *since that duty is a duty of justice involving only external relations among persons*. The State cannot compel anyone to adopt the welfare of another as an end, but it can certainly tax its citizens for the purposes of insuring that all its members have access to the means necessary for sustaining their lives and pursuing their welfare. Thus, duties of justice are moral duties and their performance can be coerced. Governments are concerned with duties of justice, not duties of virtue. A duty of justice is, by its nature, such that we can be compelled to act *according to duty, though we cannot be compelled to act for the sake of duty*. In other words, no one can be coerced into performing an action with moral worth, but certainly one can be forced to perform actions that are duties. In short, Kant's legality/morality distinction can be made to cohere with his endorsement of redistributive taxation.

Furthermore, it should be mentioned that Kant's means-ends principle implies that there are certain things rational human beings cannot do with their entitlements and themselves. For example, suicide, slavery and alienability of rights are all inconsistent with Kant's categorical imperative (Ibid. 75). This further impugns Nozick's dominant thesis that to be truly Kantian is to do whatever you like with your entitlements, including your body. To quote him again: "side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends *without their consent*. Individuals are inviolable" (ASU: 30-31, italics mine). Positively put: individuals can be used or even killed *with their consent*! Nozick's view of the overridingness of consent obviously flies in the face of Kant's thesis of inalienability of rights, and prohibition of suicide and slavery. I will return to this issue in Chapter five. Suffice it to say that the fact that Kant places limits on one's property, including one's body further lends support to my reading that Kant's categorical imperative, like the Lockean proviso, demands more than the Nozickean catalogue of negative rights.

One might react to my argument by contending that since many Kantian ethicists depart from the letter of Kant's ethics, construing the categorical imperatives in terms of the libertarian negative rights 'qualifies' Nozick as a Kantian. I take up this issue in the next section. However, it is enough to indicate now that if Nozick relied on this line of defense, he would have a hard time "disqualifying" his philosophical opponents, including Rawls, from being through and through Kantians. If Nozick could construe the categorical imperative in terms of negative rights and still be a loyal Kantian, then Rawls and others could equally construe the categorical imperative in terms of "egalitarian" positive rights and still be staunch Kantians! Indeed, as I have argued extensively, given that Kant himself believes that the categorical imperative and positive rights are not mutually exclusive, one might say that it is the proponents of positive right theorists who are *more* Kantians. Presumably, a defender of Nozick as a consistent libertarian would maintain that Nozick is not 'obliged' to take on board what Kant had to say about treating persons as ends; therefore, if being a loyal Kantian would make him *less* libertarian, then so much the worse for 'Kantianism'. I take up this issue in the section that follows.

The Indispensability of Locke and Kant to Nozick

I have contended that since both Locke and Kant overtly subscribe to positive rights, and since Nozick cloaks himself in the legitimacy of both philosophers, his overt denial of the existence of positive rights seems somewhat hypocritical. However, in support of Nozick, some commentators have contended that Nozick would throw away his Lockean mantle rather than betray his commitment to negative rights, and further throw away his Kantian mantle rather than his entitlement theory. The historical remarks, the argument continues, are rhetorical "obiter dicta" rather than being fundamental to his argument. For example, Edward Feser, one of the contemporary defenders of Nozick, holds that "as central as Kant's principle is *rhetorically* to Nozick's position, it may be *philosophically* inessential" (Feser 2004: 45, his italics). While this line of defense seems to salvage Nozick from my criticism that he cannot be a Kantian and an anti-redistributivist, I do not think Nozick could detach himself from the authorities of both Kant and/or Locke without vitiating his argument against his philosophical opponents, notably, Rawls and utilitarians.

Nozick's entire right-based theory in ASU rests on Kant's categorical imperative which emphasizes the treatment of persons as ends and not merely as means. In other words, an appeal to Kant's (not Kantians') means-ends principle is the key argument in favor of his account of justice in general. In opposition to Rawls, Nozick maintains that treating persons as ends requires granting them full rights over their *legitimate* entitlements. Any system that does not legally recognize exclusive rights of ownership, on Nozick's account, violates Kant's maxim to treat people always as ends in themselves. While he recognizes that Rawls' Difference Principle is somehow superior to the principle of utility (See ASU: 320), he nevertheless characterizes both Rawls and utilitarians as patterned theorists. Despite Rawls' vehement denunciation of utilitarianism, as we saw in Chapter one, Nozick insists that both Rawls and utilitarians ignore the separateness of persons. For Nozick, people are distinct individuals with distinct interests, and utilitarianism, because it aggregates good consequences across people, ignores these distinctions. Thus, on Nozick's account, both Rawls and utilitarians fail to treat people as separate entities because information about individuals is lost in the process of aggregation. More significantly, Nozick maintains that by trying to balance benefits and losses across people, utilitarians and Rawls end up treating people as objects or as means to an end, as Kant would put it. In short, Nozick thinks as long as Rawls' and utilitarians do not treat the rights of the affluent as inviolable, their systems run afoul of Kant's means-ends principle.

Nozick's argument against Rawls and utilitarians clearly presupposes that the only way one can be a non-patterned theorist is to respect Kant's second version of the categorical imperative, to wit, the means-ends principle. His argument has the further presupposition that one cannot be a non-patterned historical theorist without first being a proponent of Kant's means-ends principle. In other words, Nozick believes the means-ends principle and his historical non-patterned theory are logically intertwined. This being the case, if Nozick were to throw away his Kantian mantle, he would be forced to throw away his own entitlement theory as well. More damagingly, he could no longer sustain his criticisms of Rawls and utilitarians. As I have already indicated, Nozick throughout invoked the authority of Kant to dismiss Rawls' Difference Principle as well as the principle of utility. Indeed, he has been interpreted as inheriting insights from Kant precisely because of his invocation of Kant's means-ends principle to castigate his philosophical adversaries, including utilitarians, egalitarians and welfare liberals. It should be pointed out that Nozick explicitly invokes the authority of Kant, not Kantians, to justify his theory of "inviolability of rights". For example, in castigating end-state theorists in general, he writes: "Had *Kant* held this view [an end-state view], he would have given the second formula of the categorical imperative as, "So act as to minimize the use of humanity simply as a means," rather than the one he actually used: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end" (ASU: 32 my emphasis). Here it is clear that Nozick is using Kant's idea, as opposed to Kantians', to argue against his opponents. Thus, it is fair to say that Nozick would be a heir to a different tradition if he audaciously said "goodbye" to Kant. Having disowned Kant, he would deprive himself of his only wherewithal to inveigh against his philosophical opponents.

In the same vein, he cannot disconnect himself from Locke without destroying the plausibility of his own theory. As we shall see in Chapter 4, Nozick himself makes it clear that any defensible theory of justice ought to contain the Lockean proviso, (ASU: 178) a proviso which, as I shall contend, clearly mandates redistribution. Following the logic of his own argument, Nozick cannot detach his theory from the authority of Locke without destroying the plausibility of his theory of justice. In short, although both Locke and Kant are defenders of both negative and positive rights, Nozick cannot distance himself from their theories. Thus, he seems stuck with the consequences that a subscription to positive rights does not really constitute a violation of Kant's means-ends principle. If my argument above that Kant himself subscribes to positive rights is cogent, then if Nozick insists that positive rights and Kant's means-ends principle are mutually exclusive, then he would be committed to saying that Kant is not a Kantian! That is, he would be much more Kantian than Kant! To put it flamboyantly, he would be more of a Catholic than the

Pope. Nozick might try to get around this criticism by saying that he being a 'Kantian' only requires the idea that people cannot be treated as means but must be treated as ends in themselves. Rawls famously endorses the notion that people be treated as ends in themselves, yet from Nozick's perspective, Rawls does not "qualify" to be ranked among Kantians. Thus, by Nozick's own standard, endorsing the means-ends principle, in and of itself, does not make one a Kantian! If being a Kantian requires that one subscribe to the core tenets of Kant, and if, as I have argued, mandatory taxation is one of the fundamental beliefs of Kant, then it seems Rawls is more Kantian than Nozick!

Negative Rights and 'Meaningfulness' of Life

Indeed, some of Nozick's own assertions commit him to concurring with Kant that the means-ends principle sometimes demands that we provide material assistance to others to enable them live a meaningful life. For example, he seems to hold the view that one necessary condition for being treated as ends, not merely means, is being able to live a life with a meaning. In answering the question why people should possess rights Nozick writes: "I conjecture that the answer is connected with that elusive and difficult notion: the meaning of life. A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to shape his life can have or strive for meaningful life" (ASU: 50). He goes on to emphasize that what is distinctive about human beings, and what accounts for the injunction to refrain from treating them merely as means is the capacity "to act in terms of some overall conception of the life one wishes to lead" (Ibid). This conception shares with the thought that people are not merely bundles of preferences, but have the capacity to choose their own lives. It is this capacity to shape their own lives which distinguishes them from mere objects. While Nozick's claim that the purpose of having a right is to lead a meaningful life is highly controversial, I will argue later in this section that his claim commit him to endorsing positive rights.

Admittedly, Nozick does not explicitly say whether lack of libertarian right will prevent a person from leading a meaningful life. Indeed, he candidly concedes that this is a highly contentious issue which he hopes to grapple with on another occasion (ASU: 51). However, it is clear from the above passages that Nozick believes that there is a positive correlation between natural rights and meaningful life. This claim seems to have the presupposition that a right is "useless" if it is not conducive to meaningful life. Although Nozick is reticent about what exactly constitutes a meaningful life, one might say that a starving and an impoverished person with only Nozickean *negative* rights cannot lead a meaningful life. As Jonathan Wolff rightly points out, "If people have only negative rights, then there is no guarantee that many individuals will, in fact, be in a position to lead lives worth living (Wolff 1991: 31).

Since Nozick seems to argue, though with some hesitation, that the *essence* of having a right is to safeguard meaningful living, he seems committed to saying that having a right is a *necessary* condition for leading a meaningful life. This appears to commit him further to the claim that those who possess *negative* rights but are not leading a meaningful life do not *really* have rights[48]. However, this covert commitment contradicts his repeated claim that we *all* have rights. To remain consistent, arguably, he must hold that meaningful life sometimes requires more than libertarian negative rights. It might be replied that there are other necessary conditions for a meaningful life, even if a framework of libertarian negative rights is not a sufficient condition. For example, a libertarian defender of Nozick might insist that the poor can be aided by voluntary taxation and/or by voluntary cooperation of other benevolent individuals to lead a meaningful life. While this sounds plausible, we need to ask this: what if people refuse to voluntarily help? To be sure, empirical evidence gives no convincing support to the claim that the rich will always help the poor to 'lead a meaningful life' by furnishing them with material support. Given Nozick's tacit claim that the purpose of having a right is to lead a meaningful life, coupled with the obvious fact that voluntary assistance is not always forthcoming, I think it is safe to say that the poor who possess *negative* rights but are incapable of leading a meaningful life cannot be said to possess genuine rights. As a comeback, it might be said that when those necessary conditions for leading a meaningful life are absent, a Nozickean libertarian would invoke the "moral horror clause" to help the poor. I will subject Nozick's 'doctrine of the catastrophic moral horror" to rigorous analysis in Chapter 4. However, it will suffice now to pose this question: is the "moral horror clause" something enforceable by the state? In other words, is the state morally justified in violating the right of the rich to help those who are facing insuperable tragedy to the extent that they cannot lead a meaningful life? The Nozickean answer seems to be a resounding 'yes': why else would a Nozickean invoke something that is not legally enforceable! But if a Nozickean libertarian government has the authority to violate right to enable others lead a meaningful life, then Nozick's version of libertarianism is no longer absolute, as he would have us believe.

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[48] Of course, I am not talking about those whose lives are adversely affected by their own choices or accidents. Those people still have rights even if they cannot lead a meaningful life. Wes Cooper pointed this out to me, in comments on an earlier draft. If, for example, you choose to be an alcoholic and as a result of that you are unable to lead a meaningful life, it would be laughable for you to say that you don't have rights! To clarify my otherwise bizarre claim that Nozick is committed to saying that those who are not leading a meaningful life do not have rights, it will be useful to distinguish rights as necessary condition for meaningful life from rights as sufficient condition for meaningful life. While the former suggests that one *must* have a right in order to lead a meaningful life, the latter simply says that having a right is enough to lead a meaningful life. In other words, possessing a right is necessary *but* not sufficient to lead a meaningful life because it is *impossible* to lead a meaningful life without having a right; however, even if you have a right—even though that right is enough for you to lead a meaningful life—you can still lead a meaning*less* life. Thus, when I interpret Nozick as holding that the purpose of having a right is to lead a meaningful life, he should be construed as saying that having a right is a necessary but not a sufficient condition for leading a meaningful life.

It must be said, however, that while the 'moral horror clause' sits badly with Nozick's 'absolutist' libertarianism, the invocation of the clause is necessary to defend his claim that having a right is a necessary condition for leading a meaningful life. Indeed, since one needs to survive in order to lead a meaningful life, and since positive right can, at least, ensure people's survival, it is implausible, to say the least, to talk about meaningful life apart from positive rights. As Samuel Scheffler cogently posits "it seems reasonable enough to suggest that any distributable good necessary for living a decent and fulfilling life (such as food) will also be necessary for living a meaningful life" (Scheffler 1982: 153).[49] Conceding that having a right is a vital prerequisite for leading a meaningful life while rejecting the existence of positive right sounds like a person who accepts an end but refuses to accept the necessary means to that end. Surely, such a person can, and should, be accused of inconsistency, if not irrationality!

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[49] Some libertarians have recognized the importance of "positive rights" in helping the poor to lead a meaningful life; consequently, they are willing to allow a modest redistribution of resources. Ayn Rand (1964), for example, has argued that the possibility of forming rights to the resources one needs in order to live is a precondition for the very survival of man as a rational being. Thus, she endorses redistribution provided it will help the poor lead a flourishing life.

Against my interpretation, some libertarians have argued that when Nozick maintains that only persons with the capacity to shape their lives can lead a meaningful life, he is only suggesting that an individual cannot lead a flourishing life unless others respect his/her libertarian rights (Feser 2003: 50). While this reading of Nozick seems to sit well with the libertarian negative conception of rights, it does so at the cost of making it unrealistic, if not impossible, for the poor to respect the libertarian theory of rights. For, as I have argued earlier, it is unrealistic to expect the poor starving to death to respect the right of the rich in order for them (the rich) to lead a meaningful or flourishing life. And what use is a theory if it cannot realistically be respected!!!

It must also be noted that although Nozick's famous "experience machine thought experiment" (ASU: 42-45)[50] is primarily meant to impugn mental-state versions of utilitarianism, his supporting argument appears to reaffirm my contention that he is committed to the concept that a meaningful life requires more than rights to non-interference. Nozick is quite accurate that rational beings would choose *not* to plug in the machine because we value being active and actually being in control of our own lives in the *real* world. The upshot of his argument, I think, is that one's experience of experiencing one's life is inherently valuable. Thus, Nozick seems to follow Kant in putting an intrinsic value on the experience of a person. However, the former's argument, if stretched, seems to lean towards the conclusion that a person with rights but devoid of resources to put those rights into active use is more or less "hooked up to the experience machine" in the sense that the person cannot actively experience the experience of his/her life. Since, as Nozick's argument seeks to emphasize, it matters to us in a rather profound way that we be authors of our lives and/or experiences, we all need material resources to shape our own lives. Having a negative right but not being able to exercise it, does not make one a full author of one's life. Thus, although Nozick's experience machine example is not *consciously* meant to defend the existence of positive rights, it seems to commit him to the claim that there is more to being truly human than the right to "passive" non-interference. If being in control of one's destiny is crucial to live a 'meaningful life', as Nozick reminds us, then material assistance designed to help a person lead his/her own life should be embraced. We can therefore conclude that within the Lockean natural right theory, as well as within the Kantian side constraints view, there is indeed a strong argument in favor of redistribution through social welfare legislation.

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[50] Nozick summarizes his arguments as follows: "Suppose there were an experience machine that would give you any experience you desired. Superduper neuropsychologists could stimulate your brain so that you would think and feel you were writing a great novel, or making a friend, or reading an interesting book. All the time you would be floating in a tank, with electrodes attached to your brain. Should you plug into this machine for life, preprogramming your life experiences? [...] Of course, while in the tank you won't know that you're there; you'll think that it's all actually happening [...] Would you plug in?" (ASU: 42-43).

Chapter 4

The Lockean/Nozickean Proviso and the Limits of Property Rights

Introduction

This Chapter, the crux of my thesis, offers the beginnings of a defense of, among other things, patterned theories and redistribution through taxation and welfare programs. However, rather than constructing positive arguments defending patterned theories, I will be defending them by attacking the Nozickean position. More specifically, I will challenge the propriety of Nozick's reliance on the Lockean proviso with its corollary principle of compensation, given his famous "rigorist" deontic and absolute conception of rights in ASU. The chapter concludes that given the "welfarism" inherent in the Lockean proviso, Nozick cannot incorporate the proviso into his theory and sustain his pointed and scathing criticisms of patterned theories with their accompanying welfare programs at the same time. Indeed, if the argument develops in this chapter is correct, then Nozick's minimal state cannot be said to preclude welfare state services and taxation for redistributive purposes, as he and his libertarian supporters would have us believe.

The Lockean Proviso and the Theory of Initial Acquisition

The problem that seems to confront all the state-of-nature theories of acquisition is how private property can generate from common ownership. In other words, how to move from a state where external goods are common to all, to a state where particular individuals have rights over particular things has been one of the intractable problems faced by the state-of-nature theories of acquisition. John Locke, in *The Second Treatise of the Government*, after contending that "God has given the Earth to mankind in common" (II, 26) goes on to point out that "this being supposed, it seems to some a very great difficulty, how anyone should ever come to have a property in anything" (ibid 25).[1] Here, Locke is responding both to Samuel Pufendorf's argument that property arises from commonality by the unanimous consent and to Filmer's response that since such consent is not attainable, property is only explicable on the assumption that God gave to Adam a property right in the earth (C/f James Tully 1980: 95-97). Filmer's and Pufendorf's argument has the implication that no *appropriation* (i.e. acquisition of exclusive rights of use) is permitted in the absence of actual collective agreement. Since the consent of others is required for just appropriation, and since communication with others is extremely difficult, if not impossible, their argument has the ultimate repercussion that in the state of nature, private property is just impossible. For if collective approval is needed for appropriation of natural resources, then no one has the right to *do anything*, whatsoever, in the absence of a miraculously collective agreement. Indeed, since every action requires the use of some natural resources, no one is permitted to do anything without an explicit approval from others. In short, their argument seems to have the disturbing implication that no person can unilaterally rightfully move or stand in a given spot (or even rightfully occupy space) without the universal or unanimous consent of other members of society. For each person faces rights of exclusion over every single thing, whether these rights are held by each other person or all persons together.[2]

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[1] However, as we shall see soon, Locke himself appears not to think the transition from common ownership to private property as an insuperable difficulty.

In opposition to Filmer and Pufendorf, Locke proposes to show that, beginning with the claim that the earth is held in common, it is possible to derive property without universal consent. A key feature of Locke's justification in the first part of his argument is his celebrated Lockean proviso: the assertion that property rights can arise without consent "at least where there is enough, and as good, left in common for others". This "enough and as good" clause is generally known as the Lockean proviso. The proviso simply says that we have the right of acquisition *only if* we leave “enough and as good” for others.[3] In a nutshell, the Lockean proviso refers to the limitations Locke places on the acquisition of property. Essentially, Locke’s contention, contra Filmer and Pufendorf, is that when enough and as good will always be left for others to appropriate, consensual arrangement is not necessary. In short, Locke’s “enough and as good” proviso is meant to explain why, notwithstanding the fact that external goods are common to all, a person can legitimately gain a property right in natural objects without the consent of others. Locke’s argument is based upon his conviction that if unilateral appropriation were not permissible in the state of nature, people would needlessly die of hunger in the meantime while consensual arrangements were being set up.[4]

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[2] It should be mentioned that one cannot appeal to Locke's doctrine of tacit consent, according to which mere acceptance and enjoyment of benefits obligate one to one's benefactor. Locke maintains that simply by walking along the highways of a country, a person gives tacit consent to the government and agrees to obey it while living in its territory. Since Filmer's and Pufendorf's argument implies that inhabitants of the state of nature cannot even legitimately occupy space without the universal consent of others, the doctrine of tacit consent would be rendered nugatory. For the doctrine is applicable to only people who clearly benefit from being citizens. As Locke himself puts it: The tacit consenter's obligation to obey 'begins and ends with the enjoyment" (II, 121). And certainly, a person who has been rendered 'immobile' cannot be said to accept benefits.

The core of Locke’s theory of initial acquisition, with its corollary proviso, is presented in Chapter 5 in *the Second Treatises of Government*. There, Locke argues for the necessity of his proviso by contending that external goods are common to all. His claim, however, appears ambiguous. For “common to all” may refer either to negative community or to positive community. Negative community is merely an absence of any rights to external goods, and so a corresponding liberty of all to use. By contrast, positive community involves some form of common/collective ownership. In short, our original condition, for Locke, can reasonably be described as *either* one of ‘negative community’— there being no property, either joint or individual, in any particular external thing— *or* one of ‘positive community’— each person having the right to be allowed to create property. The ‘either/or’ argument above seems to imply that Locke sees the dichotomy between negative and positive community as a real one: there isn’t any reasonable third alternative.

Locke’s argument for property is based on a positive conception of community. To be sure, when Locke contrasts his claim that God gave the earth to *mankind in common* with Filmer’s claim that God gave the earth to “Adam and his heirs in succession, exclusive of the rest of posterity", he is unquestionably endorsing a positive conception of community or what one might call the original communism. Locke spends a considerable amount of effort demonstrating how and why individual property rights are generated out of common ownership. Locke's argument for collective ownership, alongside his proviso, implies that citizens of the state of nature possess a claim-right with respect to external goods.

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[3] It should be pointed out that the “enough and as good” proviso is one of the two provisos Locke introduced. The other proviso is the “spoilage” proviso according to which one can legitimately hoard up as many goods as one can as long as the goods in question do not perish uselessly. That said, in what follows, I will follow most commentators on Locke, including Nozick, in focusing essentially on the “enough and as good proviso”. I shall use the “enough and as good” proviso and the sufficiency limitation interchangeably.

[4] Locke’s point seems to be that if appropriation required universal consent, by the time we reached everybody, most people would already have starved to death.

The Lockean proviso conveys the thesis that although external resources are collectively owned, no one has a legitimate complaint. For if the proviso is satisfied, then nothing material has really changed from the perspective of others. The original equal right of self-preservation, which grounds positive community is the source of property rights, but satisfaction of the proviso ensures that each can exercise his/her right. Simply put, provided there is enough and as good left for others to appropriate, then all can exercise their right to self-preservation through appropriation.[5] Thus, the proviso implies that no one is being denied his/her rights by others' appropriation. Since those others are exercising their rights, they have a right to the property so established.

It is worth noting that although the Lockean proviso is meant to show that private property does not infringe upon anybody's right, the proviso places limits on one's acquisition. It is crucially important to notice that Locke does not use property right and full or unlimited ownership right interchangeably, as right libertarians, including Nozick, would have us believe. While one gains a property right in what one has appropriated, this property right does not constitute a full ownership right. Full ownership rights include a right to alienate, consume, modify or destroy the thing owned. A property right, by contrast, from Locke's standpoint, does not include the right to destroy what one appropriates. In deed, as we saw in the previous chapter, Locke maintains that the needy can justifiably expropriate the rich of their surplus. His claim here implies that although the rich have property right to their legitimate holdings, that right does not constitute a full ownership right. For how can one have a full ownership right to one's holding if one is not entitled to one's "surplus" holdings! That Locke subscribes to a limited right to property is further evidenced in his claim that a property right endures until it becomes clear that the property is going to spoil. Again, how can one have an unlimited ownership right to one's property if one cannot willfully let one's holdings go to spoil? It can, therefore, be said that Locke's so-called spoilage proviso, like the sufficiency limitation, is meant to place a limit on property right.[6] In sum, a Lockean property right in external goods does not, and cannot, include a right to annihilate, since the property right is contingent upon use; and it does not include full rights of exchange, since self-preservation does not require such right. This point is crucial because it clearly demonstrates that the Lockean proviso is incompatible with the absolute ownership right to property. Thus, it will be my contention that one cannot consistently subscribe to both the Lockean proviso and the absolute right to property at the same time.

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[5] Locke puts it this way: "He that had as good left for his improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's labour: If he did, it is plain he desired the benefit of another's pains, which he had no right to..." (*Second Treatise*, sec. 35, P. 22).

Nozick's "No-Ownership" Theory of Initial Acquisition

Nozick's view of ownership of initial natural resources approximates to what is a Grotian view of acquisition in a negative community in the state of nature where natural resources are open to all takers.[7] Thus, Nozick seems to have a different starting point from Locke. For he, unlike Locke, begins from a negative conception of community. That is, Nozick explicitly holds that external resources are *un*owned and as a result, they are open to acquisition by anyone who happens to be the first possessor. Nozick, in effect, endorses a first come, first-served doctrine of appropriation. In short, for Nozick, the state of nature is just a state of *no-ownership* as far as external resources are concerned.[8]

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[6] Both provisos place limit on appropriation in the sense that both provisos ensured that one person did not appropriate at the expense of others' survival. The two provisos presuppose that at every point in time, natural resources were available in sufficient quantity for potential appropriators.

[7] That said, I am not sure Nozick would consider himself a Grotian, given Grotius' insistence that natural resources belong to the common even though they are available to whoever is willing to make productive use of the resources.

[8] I shall, however, challenge the sincerity of Nozick's claim that initial natural resources are unwoned. More specifically, I shall argue that his negative conception of community is inconsistent with the Lockean proviso, a proviso he surprisingly and overtly embraces.

Because Nozick endorses the right of first occupant principle, he does not seem vulnerable to Filmer's and Pufendorf's criticism that private property is impossible because legitimate appropriation requires universal consent. In other words, Nozick does not seem to have Locke's problem of showing how anyone can ever come to licitly use anything without the consent of others. Rather, his theory of initial acquisition is intended to be a theory of how one individual can come to possess ownership rights in what is unowned. In sum, since Nozick begins from a negative conception of community or a state of "no ownership", as I have called it, one might say that he, unlike Locke, does not need any proviso whatsoever to limit legitimate property acquisition.

Nozick's Reconstruction of the Lockean Proviso

The Lockean proviso, as we just saw, says we have the right of acquisition only if we leave "enough and as good" for others. Negatively put: if the acquisition makes other people worse off, then the acquisition cannot be legitimate. The Lockean proviso has been severely criticized on the grounds that in the contemporary world of overpopulation and scarce resources, the proviso could not be literally satisfied by any system of private property rights (Held 1984, Thomson 1976). Simply put, Locke's proviso is said to be applicable only in a world where natural resources are inexhaustible. Besides, Locke's proviso seems to pose some intractable epistemic problems: *how* is it to be known that enough is "left in common for others"? Or better yet, *who* determines whether what remains is "as good" as what is taken? These apparent problems have led some commentators, including Judith Thomson (1976), to question the relevance of the entire Lockean proviso to the contemporary world.

Notwithstanding the above scathing criticisms of the Lockean proviso, Nozick explicitly maintains that any adequate and plausible theory of justice must contain the Lockean proviso (ASU: 178). Consequently, to make his own theory plausible, he incorporates the Lockean proviso into his system. However, he tries to accommodate the above apparently devastating criticisms of Locke's proviso by streamlining and reconstructing Locke's proviso. In Nozick's reconstruction, "Locke's proviso that there be "enough and as good left in common for others" (sect. 27) is meant to ensure that the situation of others is not worsened" (ASU: 175). I shall refer to "the situation of others not worsened" as Nozick's-Lockean proviso.[9]

On Nozick's reading, the main thrust of the Lockean proviso is to ensure that the position of others is not harmed or worsened by individual appropriations. Accordingly, under his proviso, what is prohibited is not appropriation *per se*, but any use of property that deprives people of the liberty they possessed in the state of nature. In short, Nozick's-Lockean proviso states that *if the acquisition makes other people worse off, then the acquisition should not be permitted.* For the sake of convenience and simplicity, let us call Nozick's proviso the "no worse off condition."

Since the appropriation by some will naturally have costs for others, Nozick tries to spell out the ways in which the proviso prohibits worsening the position of others. It should be emphasized that Nozick does not regard the proviso as a general principle against the worsening of others; it does not exclude all ways in which one's actions might make others worse off (ASU: 178). If the proviso were a general prohibition on worsening the situation of others, then it would also constrain activities such as competition when that has a negative impact on others. But the proviso allows for fair competition even when such a competition will palpably have adverse impact on others. To illustrate, if I appropriate materials to make some of what you are selling and become your competitor and as a result of my competition with you your profit margin tremendously reduces, even though I have made you worse off (in the sense of being responsible for the fall of your profit margin), I have not harmed or wronged you. I therefore owe you no compensation. Nozick's argument, as I understand it, is that both of us have the full liberty to appropriate and enter into competition. As long as my appropriation to compete with you does not, in any way, prevent or lessen your liberty to appropriate, I am not morally or legally bound to compensate you. Simply put, inconveniences and losses that come about by perfect competitions do not qualify as harm or violation of liberty. In sum, from Nozick's standpoint, only non-appropriators who lose their liberty to appropriate as a result of others' appropriation are entitled to compensation.[10]

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[9] Nozick confines his discussion of the Lockean proviso to the "enough and as good left in common for others" proviso. He does not mention the spoilage limitation let alone discuss it.

Nozick spells out two possible ways non-appropriators can be made worse off by others' appropriation: "First, by losing the opportunity to improve his situation by a particular appropriation or any one; and second, by no longer being able to use freely (without appropriation) what he previously could" (ASU: 176). In other words, he demarcates between appropriation that worsens other people's position in the sense of harming them (i.e., depriving them of their liberty) and appropriation that worsens people's condition in the sense of merely depriving them of the opportunity to appropriate. To this end, he distinguishes between what he calls the stringent proviso and the weaker proviso. He rejects the more stringent requirement on the grounds that it would prohibit any appropriation whatsoever. The reason for his preference for the less stringent version is that he believes the weaker version only deprives people of opportunities but not of rights, whereas the stringent proviso deprives people of *both* opportunities and rights.

Nozick's main reason for thinking that the more stringent requirement is unduly strong apparently rests on the argument that if justifying each appropriation were to require that enough and as good be left for other to appropriate, then any appropriation of a finite resources such as land would obviously fail to satisfy the requirement. For if at some point an appropriation were to be prohibited because it failed to leave enough and as good for others to appropriate, then the appropriation prior to that would also fail to leave enough and as good for others, and so on back to the first appropriation. Given that many of the goods to be appropriated are finite resources, at some point an appropriation of these will fail to leave enough and as good for others to appropriate, and hence no appropriation of a finite resources will leave enough and as good for others to appropriate. As Nozick vividly illustrates:

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[10] Nozick's principle of compensation raises a lot of difficult questions: For example, how can we be certain that non-appropriators who are harmed by our appropriation are adequately compensated? Or better still, what constitutes a befitting compensation? How do we measure the compensation? Who determines the amount of compensation to be paid? I will return to these contentious issues when I discuss the relationship between the Nozickean Proviso and the principle of compensation.

> Consider the first person Z for whom there is not enough and as good left to appropriate. The last person Y to appropriate left Z without his previous liberty to act on an object, and so worsened Z's situation. So Y's appropriation is not allowed under Locke's proviso. Therefore the next to last person X to appropriate left Y in a worse position, for X's act ended permissible appropriation. Therefore X's appropriation wasn't permissible. But then the appropriator two from last, W, ended permissible appropriation and so, since it worsened X's position, W's appropriation wasn't permissible. And so on back to the first person A to appropriate a permanent property right (ASU: 176).

The upshot of Nozick's "zipping-back" argument is that the strong interpretation of Locke's proviso renders any appropriation of property unjust, and hence if we literally followed it, the legitimacy of the entire institution of private property would be called into doubt. Accordingly, Nozick insists that potential users would have to be compensated only for their loss of access to the thing to be appropriated, but *not* for their lost opportunity to appropriate. This, he believes, would make private property possible as the social benefits of people would more than make up for the loss of that person's use. (This point will be taken up later in this Chapter.)

The Apparent Plausibility of Nozick's Version of Locke's Proviso

Locke's stringent proviso appears to pose a threat to Nozick's entitlement theory, since his proviso seems to invalidate private property in general. Thus, Nozick's strenuous effort to reconstruct the Lockean proviso to weaken it should be appreciated. Nozick is not alone in holding that the stringent requirement (Locke's proviso) is unduly rigid, if not unrealistic. David Schmidtz, for one, has recently joined Nozick in contending that any particular act of initial appropriation, in a world of scarcity, stands virtually no chance of satisfying the Lockean proviso (Schmidtz 1990: 505). To be sure, the stringency of Locke's proviso has stirred other philosophers to argue against any literal interpretation of the "enough and as good" proviso. Here, I have in mind Rolf Sartorius who holds that if the Lockean proviso is "understood as an original limitation on the right to appropriate natural resources, the condition that 'there be enough and as good left for others' could not of course be literally satisfied by any system of private property rights" (1984: 210).

Interestingly, Locke himself regards his (stringent) proviso as coexistent with private property. Indeed, as we have seen, Locke invokes the so-called stringent proviso to justify private property. The decisive question then is this: If Locke's proviso is incompatible with private property, as the above mentioned commentators and Nozick clearly suggest, then why did Locke invoke the same (stringent) proviso to defend private property? The answer to this, in my view, is quite simple: Locke introduced the proviso at a time when natural resources were abundantly in supply.[11] Given the prevailing superfluity of natural resources, the proviso seems explicable in the days of Locke. However, the proviso's explicability cannot be extended to a world where land and other natural resources are extremely scarce. To be sure, in the contemporary world, proponents of private property would dismiss Locke's proviso as anachronistic, if not wholly useless. Judith Jarvis Thomson puts the argument clearly:

> I suspect that there is no plausible construal of what Locke had it in mind by 'enough, and as good' under which anyone's taking land for himself would leave enough and as good for all the other owners… I therefore suspect that if we take leaving enough and as good as a necessary condition for property acquisition, then it will follow that there can be no private ownership of land (1976: 666).

Thus, Thomson dismisses any literal interpretation of the proviso as untenable. Given that Locke argues in favor of private property, and given that any literal interpretation of the proviso renders acquisition of private property impossible in a world ('our' world) where natural resources are limited in supply, if Locke were alive today, he would, arguably, join Thomson in dismissing any literal interpretation of his proviso.

If the contention that Locke's proviso is suitable only in the period where resources are bounteous is correct, then one might say that Nozick is justified in reinventing the proviso to suit the conditions of the modern world of "scarcity". More importantly, if Nozick's weaker version of the proviso does not aggravate the condition of others, then he seems right in insisting that no one has a legitimate complaint if his version of the proviso is satisfied. As he asks: "is the situation of persons who are unable to appropriate (there being no more accessible and useful unowned objects) worsened by a system allowing appropriation and permanent property?" (ASU: 177). Nozick responds to this question by resorting to the benefits of private property. According to him, the benefits of private property may compensate, if not overcompensate, non-appropriators for lack of access to natural resources. Indeed, David Schmidtz has argued that non-appropriators' situation is in general immensely better as a result of some people's appropriation. In his own words: "first appropriators begin the process of resource creation, while late-comers like ourselves [i.e., non-appropriators] get most of the benefit" (Schmidtz 1994: 45). Nozick, like Schmidtz, holds that since capitalism increases the standard of living of *both* property holders and non-appropriators, any complaint on the part of non-appropriators would be unwarrantable. In other words, as long as one's condition is not made worse off by another person's appropriation, one has no cause to complain about any foul play.[12] Nozick believes that those who are unfortunate not to have access to the means of production would be offered employment by the capitalists. He goes as far as to assert that the economic development that accompanies private property is beneficial even to future persons. This is so because some resources will be kept from current consumption for future markets (See ASU: 177).[13] This leads Nozick to the conclusion that private property easily satisfies his version of the proviso, but not Locke's.

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[11] The introduction of the proviso in conditions of abundance sets a puzzle for some commentators on Locke. John C. Winfrey, for example, argues that since resources are unlimited in supply in a state of nature, the "enough and as good left in common for others" sanction is redundant (Winfrey 1981: 432 fn. 26). In fact, one may add that both provisos, namely, the "sufficiency limitation proviso" and the "spoilage proviso" are uncalled for in a world where resources are bounteous. If enough and as good is already left for others, then one might say that my waste cannot harm or worsen anyone else's situation. This is so because after the waste, there will *still* be enough and as good left for others to use. Similarly, if I destroy what no one else wants, (because everyone already has enough to keep them surviving) my destruction can be said to be innocuous. Amazingly, Locke condemns even "harmless" waste. One would have expected Locke to distinguish between "destructive waste" and "harmless waste" and condemn only the former. Probably being an ardent Christian, Locke uncompromisingly regards spoilage to be morally wrong even where resources are unlimited. This claim seems to be corroborated by Locke's insistence that "nothing was made by God for Man to spoil or destroy" (II, 31). But, as A.J. Simmons rightly points out, why God would condemn waste that has no harmful effect remains unclear (See Simmons 1992: 287 fn158).

In a nutshell, on Nozick's interpretation, the fundamental principle underlying Locke's proviso is that one's appropriation should not jeopardize the survival of others. Nozick appears to be enunciating that it is not appropriation of property that really matters but the preservation of mankind. In my reckoning, there is much to recommend this view, (indeed if that is his view!). If it is really the case that private property ensures preservation of all mankind, as Nozick is tacitly saying, or if private property counterbalances the diminution in opportunity, as he explicitly states, then one might say that it does not really matter whether some are not 'left' with 'enough and as good' natural resources. If my interpretation is right, then Nozick's reconstruction of Locke's proviso can be said to carry a lot of plausibility. Against Locke's inflexible proviso, it can be argued that Locke's proviso does not, in and of itself, guarantee the preservation of mankind. To be sure, one can conceive of a situation where Locke's proviso will not be conducive to Locke's intention, namely, the preservation of all mankind. As a matter of fact, since getting access to natural resources cannot automatically guarantee one's preservation, there is much to worry about Locke's stringent proviso. To illustrate this point, one may be left with enough and as good of natural resources but natural catastrophe such as Hurricanes Katrina, Rita and Wilma may prevent one from making any productive use of what has been left for one to appropriate. In such unfortunate instances, one may be starving to death notwithstanding the fact that one has been left with "enough and as good" resources. By contrast, as we shall see shortly, Nozick's weaker version of the proviso seems to require that those who are deprived of the use of natural resources and encountered natural disasters be aided in the form of compensation[14]. Thus, in a Nozickean society, those who are not left with "enough" resources need not worry about their preservation. Given this, one might conclude that there is something inherently privileged about Nozick's version of the Lockean proviso, and thus there is a good reason to accept his version rather than Locke's.

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[12] Nozick's position on this seems to be reminiscent of J.S. Mill's. For Mill, if one's appropriation does not cause any loss to others, then one is entitled to enjoy the fruits of one's labor. In response to Proudhon's question as to why labor should justify private appropriation, Mill writes: "It is no hardship to anyone, to be excluded from what others have produced: (The producers) were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all." Mill, *Principles of Political Economy*, Book II, Chapter 2, § 6, p. 230 in Vol. 2 of *The Collected Works of J.S. Mill*, 1965. Quoted in Lawrence C. Becker, "The Labor Theory of Property Acquisition", 660.

[13] I will evaluate the plausibility of Nozick's argument in favor capitalism shortly. More specifically, I shall contend that he is not entitled to invoke the benefits of capitalism to defend his provision.

Indeed, given that fulfillment of the Lockean proviso does not necessarily guarantee the preservation of non-appropriators, the proviso, in principle, could be self-defeating. As noted already, the essence of the "enough and as good left" clause, as Locke incessantly reminds us, is to ensure preservation of mankind in general. If those who are strong enough are allowed to use as much resources as their energy will allow them, they will be in a better position to preserve those who cannot make any good use of the resources owing to, say, physical infirmity. On the other hand, if we insist that those who are capable of producing should meticulously adhere to the sufficiency limitation, they might not be able to produce more than enough to sustain themselves, let alone sustain others. And even if they can preserve others, so far as they have left others their 'fair share' of the natural resources, they might, with justification, not be willing to do so. The point is this: if the "enough and as good left" proviso were rigidly applied and categorically enforced, it would imply that those who are physically incompetent to produce but have access to their fair share of resources would perish needlessly. As Jeremy Waldron aptly argues, "by enforcing a Sufficiency Limitation, we would be limiting the ways in which we could ensure the survival of others, and we may well limit the number of people we were able to preserve" (Waldron 1988: 215).[15]

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[14] As we shall see, Nozick owes us a 'libertarian' explanation why the proviso should be responsible for compensating this kind of deprivation, given that it is not the kind where another's appropriation is at fault. An unmitigated libertarian would say this is an act of God, for which 'mortal' beings cannot be held culpable.

The gist of my argument is that it is possible to meet the requirements of the "enough and good" proviso while others starve to death. Thus, it stands to reason that one can excusably violate the sufficiency limitation clause (i.e. one can appropriate without leaving enough and as good for others to use) as long as one uses the proceeds from one's labor to advance the preservation of those who are physically incapable of appropriating. In short, since Nozick's proviso seems to ensure non-appropriators the opportunity to survive, it can be said that his reconstruction of Locke's proviso is benign.[16]

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[15] A.J. Simmons, on the other hand, contends that Locke's fair share limit or the sufficiency limitation cannot be contrary to God's intention or the law of nature. His argument is that Locke never took conditions of scarcity into consideration (See Simmons 1992: 290 fn167). While Simmons is right that Locke wrote at a time where resources were abundant in supply, I think his proviso can, in principle, violate the requirements of the law of nature in times of scarcity. Also, one might say that even in a world of plenitude, a conflict between the proviso and the law of nature is possible. E.g., where resources are available but some cannot make good use of them owing to physical impediments, the preservation of those who are physically handicapped might be in danger. Even though Jeremy Bentham is not a defender of inordinate capitalism, he defends the right to property on the grounds that property holders might use their resources to sustain the poor. This fact further motivated Bentham to contend that governments should not limit the wealth of the wealthy because they can use their wealth to preserve those who have no means to provide for themselves in society. To quote him, "without property, there would be no general guarantee of subsistence...Without abundance for some, there would be less certainty of subsistence for all." Quoted in Alan Ryan, *Property and Political Theory*, 96. Here, Bentham, could be interpreted as saying that as long as the poor's survival is guaranteed by the rich, the "sufficiency limitation" could be justifiably violated.

What Counts as Worsening Another's Situation?

Nozick, as we just saw, subscribes to only the weaker or less stringent version of the proviso because he believes that it is the only proviso that can be satisfied even in conditions of extreme scarcity of resources. Nozick's proviso, unlike Locke's, permits appropriation that does not 'leave enough and as good left in common for others' so long as the appropriation does not aggravate the position of others.

Nozick's proviso, despite its apparent plausibility over Locke's, appears to have some epistemic and conceptual problems of its own: How are we to determine whether others' positions are worsened owing to appropriations of other people? And 'worse off' in terms of what and in comparison to what? Or better still, what exactly are we trying to measure? In short, the epistemic problem confronting Locke is no worse than that confronting Nozick. Indeed, Nozick's problem appears (more) complicated by the fact that it is virtually impossible to acquire property without worsening the conditions of others. If I make an acquisition, without a doubt, I would be better off than those who own nothing and thereby worsen their situation. I may *compensate* those whose conditions have been worsened by my appropriation but they may still feel inferior or marginalized as a result of their inability to appropriate. By contrast, appropriators may feel naturally superior by virtue of their appropriation. Indeed, the overwhelming historical evidence indicates that excessive private property right translates easily into unwarranted considerable power in a society. This being the case, even if non-appropriators are compensated, they would still feel marginalized, if not enslaved by others' appropriation. As John Stuart Mill once contended, "by force of poverty; they [non-appropriators] are still chained to a place, to an occupation, and to conformity with the will of an employer…" (Mill 1967:

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[16] Nozick would undoubtedly agree with A.J. Simmons: "If my rights can be secured without my freedom to appropriate, I may still have my fair share of God's bounty. What must be guaranteed to each person is the opportunity to living" (See Simmons 1992: 293). Because restriction on appropriation leaves every one worse off, some philosophers have argued that the Lockean proviso not only allows for initial acquisition of unowned resources; in many cases, it actually requires it (Schmidtzz 1995: 46-50).

710).[17] For this reason, some philosophers have contended that "lack of property can be just as oppressive as lack of legal rights" (Kymlicka 1990: 121). If it is the case that holders of excessive private property almost invariably end up being power wielders who typically use their positions to terrorize non-appropriators, then one might say that Nozick's principle of compensation might not offer much solace to non-appropriators.[18]

Indeed, Andrew Kernohan has argued that Nozick's claim that the conditions of "compensated" non-appropriators are not worsened is tantamount to the assertion that non-appropriators are basically interested in consuming goods; this, he thinks, is an affront to humanity. Thus, he insists that Nozick's version of the "Lockean proviso accepts a picture of persons as essentially consumers of the products of the productive process. This unexalted vision of humanity presupposes that the only interests of persons which need protecting are passive desires to consume. And this is simply false. Persons are essentially producers as well as consumers" (Kernohan 1988: 70).[19] Again, if it is the case that the control of resources on which the "propertyless" livelihood depends can put the propertied in a position to exercise control over the "propertyless", then one can rightly conclude that the status of those who are deprived of the opportunity to appropriate cannot be genuinely enhanced by sheer compensation. Indeed, historically, property, regardless of its value, has been used as an instrument of discrimination, as well as to influence the political process. As Becker perceptively notes: "even a toothbrush, insofar as it is an advantage, puts its possessor in a position of relative superiority over those who do not possess one" (Becker 1976: 661).[20] Put differently, property owners cannot help but negatively affect the lives of the propertyless. This seems an inescapable fact of the world.

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[17] I quoted this from Will Kymlicka's *Contemporary Political Philosophy*, 1990, 121.

[18] To be sure, as we saw in Chapter two, in one of his Post-ASU writings, Nozick concedes that heavy concentrations of wealth can limit the liberty of the propertyless because wealth or private property, by its nature, gives owners undue liberty that others lack. He therefore proposes a "patterned" principle called "subtraction rule" as a legitimate way of dealing with unfair inequalities brought about by bequests (TEL 30-31). In short, Nozick now explicitly accepts some patterning in order to avoid outcomes that are unfair.

[19] A similar point is made by Andrzej Rapaczynski "Man is not just a consumer, but above all a producer." Rapaczynski, like Kernohan, holds that lack of property deprives people of the possibility of realizing their full dignity. See Rapaczynski, *Nature and Politics*, 210-212.

[20] Stephen Munzer has contended that private property necessarily gives control over others, because the right to exclude others from things is the right to control the terms on which they will use those things. However, one might argue that Munzer's claim is unduly strong: This is so because where

In my opinion, Nozick underestimates the adverse impact appropriation has on the conditions of 'compensated' non-appropriators. He seems to ignore the psychological and psychic injuries non-appropriators sometimes go through, injuries that are hardly compensable. Gregory Kavka has expressed similar sentiments: "those who are prevented from acquiring property typically suffer psychic losses also — pangs of envy, painful resentment of those who seem no more deserving than they but who possess much more" (Kavka 1982: 376). Even if non-appropriators' psychological injuries are compensable, they may still have a valid reason to complain given the fact that mere compensable claims are not ownership rights; they are not even property rights. Indeed, if Nozick's principle of compensation is strong enough to nullify any complaint, then non-appropriators who interfere with others' property do nothing wrong as long as they compensate appropriators. Nozick's principle of compensation seems to have the implication that interference with what has been appropriated does not constitute violation of rights provided appropriators are compensated. If appropriators who are compensated for interfering with their property have grounds to complain, then one might say that non-appropriators who are compensated by appropriators equally have grounds to complain. Nozick's principle of compensation is vague, if not vacuous, in the sense that the principle could be invoked to defend any system, including *even* communism. That is, under communism, staunch communists could compensate the capitalists who are made worse off by collective ownership.[21]

Even if, for the sake of further analysis, we grant that Nozick's principle of compensation is enough to placate non-appropriators under capitalism, the principle seems to make his proviso more stringent than he seems to realize: If a

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ownership is widely dispersed and ownership rights are limited, markets offer the possibility of impersonal access to a wide range of resources.

[21] Of course, Nozick views this question as fundamentally empirical. What is wrong with the 'communist' proposal is that the evidence is in: it does not work to make everyone's boat rise. He believes this evidence obviously favors capitalism. However, this "empirical" argument against communism is beside the point. The relevant point is that Nozick's principle of compensation implies that those who *choose* to be communist could compensate the capitalists who are made worse off by collective ownership!

legitimate property acquisition should not constitute a loss to non-appropriators, as Nozick relentlessly reminds us, and if virtually all property acquisition is bound to make other people worse off, as Becker and Kavka have rightly pointed out, then one might say that Nozick's version of the proviso, like Locke's, is unduly stringent, thus making it almost impossible to satisfy. I say it is 'unduly stringent' because the proviso requires appropriators to compensate numerous non-appropriators whose conditions are bound to deteriorate as a result of others' appropriative actions. Nozick seems to ignore the brute truth that the removal of things from the common necessarily imposes losses on other individuals, individuals who invariably happen to be in the majority. In short, Nozick's proviso or what one might call his "no-loss requirement", like Locke's "enough and as good" proviso, seems to cast doubt on property holdings in general, and his entitlement theory in particular. We are, therefore, led to the conclusion that his version of the proviso does not seem to have any obvious advantage over Locke's, as he would have us believe.

Indeed, to Nozick's credit, he appreciates the difficulties in justifying his version of Locke's proviso. In particular, he is painfully aware of the difficulties in determining what constitutes 'a worse off.' He candidly concedes:

> "The difficulty in working such an argument to show that the proviso is satisfied is in fixing the appropriate baseline for comparison. Lockean appropriation makes people no worse off than they would be *how*? This question of fixing the baseline needs more detailed investigation than we are able to give it here" (ASU: 177).

He refers to this as the problem of 'baseline' for comparison.

Notwithstanding his concession of the difficulty in fixing the 'baseline', Nozick endeavors to spell out what he thinks counts "as worse off." He writes: "A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened" (ASU: 178). So, Nozick's answer to the question regarding what constitutes worse off involves comparisons between a person's actual level of well-being and how well-off he would have been under certain *counterfactual* conditions (that is, if certain acquisitions that did take place, had not taken place). To illustrate: if Jones' acquisition deprives Smith of using what both Jones and Smith could have freely used prior to Jones' appropriation, then Smith is undoubtedly made worse off by Jones. So, here, the baseline against which Nozick would make comparison is Smith's condition prior to Jones' appropriation and his (Smith's) situation after the existence of Jones' property. If Smith's condition after Jones' property is better or even exactly the same, then Smith has no legitimate grievance against Jones since Jones's property has not rendered him worse off. Thus, the thrust of Nozick's 'baseline' argument is that as long as Jones' acquisition has not adversely affected Smith's condition, Jones' acquisition is wholly legitimate.

Nozick's 'baseline argument', so construed, seems to be fraught with some obvious problems. For example, he does not give us any developed argument justifying why he compares Smith's current position with how he would fare in his low condition of a *capitalist* economy. More generally, Nozick owes us a justification as to why a comparison with the situation where no one has claims at all with respect to material resources be the *only* relevant basis for comparison. Why shouldn't the relevant baseline be how better off the non-appropriators would be if there had been collective ownership of resources throughout history? Simply put, Nozick's "baseline" appears biased in favor of capitalists and against socialists. G.A. Cohen has expressed similar sentiment: "Nozick's proviso is too lax, that he has arbitrarily narrowed the class of alternatives with which we are to compare what happens when an appropriation occurs with a view to determining whether anyone is harmed by it" (1995: 78). Cohen further asks: "why should we not regard the land, prior to A's appropriation, as jointly owned, rather than as Nozick takes for granted, owned by no one?" (Ibid 83). One might conclude that since Nozick does not consider other class of alternatives, including socialism and communism, his proviso cannot be said to be neutral. Simply put: his proviso unavoidably begs the question against detractors of capitalism.

Nozick, as we noted earlier, emphatically insists that no one has a legitimate reason to complain if his version of the proviso is satisfied. His reason for making such a claim should be familiar to us by now: individuals are not worse off than they would have been had there been no appropriation whatsoever. However, if my argument above is a sound one, then Nozick can no longer hold on to that claim:

Since he ignores other alternatives or possibilities, those who prefer any of the 'ignored' alternatives would have a legitimate reason to complain. To illustrate, let us return to our previous example regarding Smith and Jones: if Smith's preference is socialism and he sincerely believes socialism would make him better off, then he would have a valid reason to complain *even though Nozick's proviso does not make him worse off.* In other words, the mere fact that Smith is not currently worse off but could have been better off under other alternatives provides him solid grounds to complain. In essence, Smith can claim that although Jones' exclusive right to some holding makes him (Smith) no worse off than he would have been had no appropriation ever taken place, he is worse off than he would be if he too had a share in what Jones has appropriated, or, better still, if property were not private at all.

Presumably, libertarians would say that if Smith made such a complaint, his complaint would be based on sheer envy. But since, the argument continues, envy must not be built into any theory of justice, Smith's grievance would be dismissed as groundless. Indeed, Nozick alludes to this line of argument when he avers: "it would be objectionable to intervene to reduce someone's situation in order to lessen the envy and unhappiness others feel" (ASU: 245). While it might be unacceptable to build envy into a theory of right, I think Nozick's riposte misses the point of the objection.[22] Smith has a legitimate reason to complain not because he (Smith) is envious of Jones. In fact, he is not saying that he, rather than Jones, ought to own the things appropriated. Rather, Smith's complaint is based upon the fact that Jones' having exclusive control over these resources makes impossible other property arrangements under which he, Smith, would be better off. In effect, Smith is only claiming that there is nothing inherently privileged about the particular set of rights that Jones is claimed to acquire. And one who makes such a claim cannot genuinely be accused of envy! Indeed, if the contention that Smith's complaint is based on envy is a valid one, then Smith could also say that Jones is equally guilty of envy by disregarding other alternative possibilities. To buttress his case, Smith could argue that while it is true that he (Smith) is no worse off than he would have been in a state of nature, it is equally true that under an arrangement whereby he (Smith) gets a share in the benefits of some other arrangements, Jones is no worse off than he (Jones) would have been in a state of nature. Thus, if getting a share in the benefits of some other alternatives does not in any way exacerbate his (Jones') condition but betters his (Smith's) condition, then Jones' refusal to consider other arrangements could rather be attributed to 'unreasonable' envy, if not narcissism!

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[22] However, some might say that it is not unreasonable to build envy into a theory of justice. Rawls, for one, believes that where there are extreme inequalities, the envy of the poor can be said to be "reasonable" (Rawls 1971: 145). Thus, Rawls contends we eliminate or reduce extreme inequality in holdings so that the poor would have no legitimate reason to be envious of the rich. But I don't think any theory of justice which aims at eliminating envy can be efficacious. Indeed, such a theory might succeed in eliminating the envy of the poor, but it would also "succeed" in giving the rich justifiable reasons to be envious of the poor: It would be like robbing Peter to pay Paul, so to speak: The rich who are forced to share some of their hard-earned belongings with the poor might become envious, and justifiably so, of the poor. Aristotle seems to "justify" such an envy on the part of the rich: "those who do more work and get less recompense, will be bound to raise complaints against those who get a large recompense and do little work" *The Politics of Aristotle*, 49. If the rich express envy, do we have to give their belongings back to them from the poor? And if we do, don't we go back to where we started?

As a comeback to this objection, a libertarian might argue that since Smith did not really opt for socialism as his preferred alternative, my argument above is based on sheer speculation, if not, fantastic counterfactuals. Indeed, this has been Jan Narveson's main contention. According to Narveson (1988), comparisons with other possible systems of property cannot provide a basis for legitimate complaint because, although these were options, they were not options which anyone *really* instituted. Had people *really* chosen to appropriate jointly, for example, rather than privately, they would have been entitled to do so. But, since people opted to appropriate as they did, Narveson's argument continues, it is not germane that some would now be better off if other people had chosen differently. If most people had chosen to appropriate collectively, then those who would prefer private appropriation could make the similar complaint. But under this view, someone's complaint that s/he would be better off had others chosen differently is not a valid complaint (Narveson 1988: 69-71).

While Narveson's argument has some superficial plausibility, his argument, in my opinion, is peripheral at best, if not wholly irrelevant, to the issue at stake. Contrary to what Narveson's argument suggests, we are concerned not only about whether people are entitled to engage in some particular activities, but also about *why* engaging in these activities should be thought to result in one sort of right or rather than another, or even result in right at all. Why shouldn't engaging in the relevant activity give rise to a limited right to property? Why should it give rise to property rights that include the right to destroy the thing owned and a right to exclude others from harmless use? Why shouldn't the relevant activity give rise to usufructory rights[23] rather than to absolute property rights? Narveson's otherwise plausible-sounding argument seems to evade the issue under consideration: nothing about the types of activities that are thought to constitute original appropriation uniquely picks out full-blown ownership rights. This being the case, his argument fails to salvage Nozick from my criticisms. If Nozick and his libertarian supporters want to appeal to a prohibition against harm, then they ought to show why considerations about how people would fare under these sorts of alternative sets of rights do not provide an acceptable baseline for comparison. As well, they need to give us an argument justifying their failure to consider the position others may have achieved under alternative distributions or arrangements. Until and unless they do that, Nozick's weaker version of the Lockean proviso can be said to be unacceptably exclusive, if not discriminatory. Thus, his 'weaker' proviso, contrary to what Nozick asserts, seems to be in violation of the right of non-appropriators who prefer to appropriate collectively rather than privately.

The Applicability of the Nozick-Lockean Proviso

Nozick famously stresses that violations of the Lockean proviso constitute clear examples of injustices in initial acquisition. For example, he maintains that the proviso is violated if a person appropriates all of something necessary to life, contending that such a person loses his/her entitlement to something that was originally legitimately his/hers (ASU: 179). Indeed, he goes as far as to say that, under his proviso, the legitimacy of a person's full right (to property) can be affected by the *unfortunate* situation of others (ASU: 180). Nozick offers concrete examples all designed to demonstrate cases where his proviso legitimizes and illegitimizes appropriation. One of the examples he uses to show where the proviso cannot be brought into play is a medical researcher who successfully synthesizes a new material that enables him to cure a disease. On Nozick's reading, the researcher does not really worsen the situation of others by selling them the material only on his terms, even though the situation of others would undoubtedly improved considerably if the new substance were dispensed cheaply to those in dire need (ASU: 181). Nozick's reason for holding this view is that the chemical substances out of which the new substance was synthesized are readily available, and thus others can appropriate it if they so desire. Put differently, as long as the medical researcher does not render the needed resources scarce, his appropriation is in keeping with the Lockean proviso.

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[23] Usufructory rights are rights of temporary possession, use or enjoyment of the advantages of property belonging to another or group of people.

To develop Nozick's argument further, let us suppose the needy are physically handicapped and thus cannot work. Worse still, let us suppose further that most of their resources are drained in obtaining the basic necessities, including the purchase of the new substance at whatever price the medical researcher demands. The cumulative effect is that they are now left extremely impoverished and agonized. Even in this supposedly unfortunate and horrible situation, Nozick insists that the Lockean proviso cannot be operative. This is so because their ill-fated situation is not aggravated by the researcher's appropriative actions. Nozick uses this seemingly 'ruthless' example to counter the criticism that his endorsement of the Lockean proviso commits him to endorsing an end state principle. Nozick's essential point is that if the Lockean proviso were an end state principle or a patterned theory, such as Rawls' difference principle, then it would not be right for the researcher to withhold his discovery, nor would it be right for him to sell it for whatever price he chooses.

Having given us examples to show cases where the Lockean proviso justifies appropriation in the midst of others' apparently dismal condition, Nozick then proceeds to offer a different example to show a situation where the *same* proviso can render an appropriation illegitimate. For the sake of brevity, I shall refer to the example Nozick uses to render the otherwise legitimate acquisition illicit as the "water hole" example. His celebrated "water hole" example goes like this: "a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it happens that all the water holes in the desert dry up, except for his" (ASU: 179). This example clearly shows that *the proviso is applicable not only to initial acquisition, but also to something someone already legitimately owns.* The Lockean proviso, according to Nozick, applies to the "water hole" case, because appropriation of the water hole makes other people worse off. Thus, the ownership of the remaining water hole should be necessarily nullified.[24]

What is the difference between the "medical researcher" example and the "water hole" example that warrants different radical conclusions, one might curiously ask? The answer is simple, from Nozick's perspective: the researcher's appropriation did not make those chemicals scarce; consequently, others can equally appropriate if they choose to do so. By contrast, those whose water holes have been destroyed cannot find other water hole; therefore, their condition has been worsened. In other words, the impossibility of finding other water holes to ensure their survival makes the Lockean proviso applicable to the water hole case, but medical expertise, not being a natural resource, does not fall under the proviso. Against Nozick, one might contend that since both the water hole owner and the medical researcher acquired their holdings without violating the rights of non-appropriators, the two cases are not fundamentally different. But we may pass over this objection for now. [25]

The question I wish to raise in the remainder of this chapter is whether Nozick is entitled to invoke even the less stringent proviso to limit the otherwise legitimate water hole given his repeated and famous claim that his entitlement theory legitimates property right. If Nozick's absolute entitlement theory, as we saw in Chapter 1, is *sufficient* to legitimize unrestrained (property) rights, then why should it be necessary for him to adopt any version of the Lockean proviso at all to constrain the otherwise legitimate property? To show why 'absolutist' libertarians cannot consistently support the Lockean proviso, let us remind ourselves of the intent of the Lockean proviso: the fulfillment of the law of nature, namely, the preservation of mankind. Given this import of the proviso, Locke makes it abundantly clear that one's property cannot be legitimate while others' survival is in jeopardy. This then suggests that the Lockean proviso incontrovertibly limits *even* legitimate property rights.

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[24] Nozick might say that the ownership of the remaining water hole should be *suspended* until others find another water hole.

[25] The fact that until others water hole dried up, the lucky water hole owner was *fully* entitled to his/her property seems to suggest that both the water hole owner and the medical researcher originally acquired their holdings *legitimately*. Given this fact, it is not clear why the unfortunate situation of others should affect the legitimacy of the water hole but not the researcher's property. I will return to this point shortly.

If my reading of the Lockean proviso is correct, then the same proviso cannot be used as a test for legitimacy of *absolute* property. As we saw in Chapter one, Nozick insists that his entitlement theory exhausts the subject of justice, contending that a person may legitimately come into the possession of *anything* as long as that person does not violate the entitlement theory (ASU: 151). Nozick is explicit, unequivocal, certain and emphatic on this claim. Elsewhere, he makes it crystal clear that entitlements originally generated by a principle of appropriation make up the entire structure of rights (ASU: 238). Indeed, when Nozick dramatically and notoriously avers that "whatever arises from a just situation by just steps is itself just" (ibid. 151), he is clearly suggesting that the entitlement theory is sufficient to legitimate absolute property. Thus, if, as I have argued, the Lockean proviso places limits on even legitimate holdings, then one might justifiably insist that neither the stringent nor the weaker version of the proviso has a place in Nozick's absolute entitlement theory of rights. Yet, paradoxically, not only does Nozick endorse the proviso, he also insists that any theory of right, including his own theory, gains its plausibility from the Lockean proviso! (See ASU: 178).

From Locke's perspective, the proviso is absolutely necessary because the world's natural resources belong to mankind in common. Locke believes that the recognition of the proviso is extremely essential because all of us are under a moral obligation to ensure the survival of others as well as ourselves (Locke calls this the "Fundamental Law of Nature"). This being so, for Locke, the proviso is inextricably tied to his conception of positive communism or what I have called earlier the "doctrine of original communism": the doctrine that mankind originally had collective entitlement to all natural resources. Nozick, unlike Locke, begins from a negative community or what I have called the doctrine of "No ownership": the doctrine that external resources are unowned; therefore, they are open to acquisition by anyone who happens to be the first possessor. Since Nozick takes the world of extra-personal objects to be *unowned*, there is something extremely puzzling about his endorsement of the Lockean proviso, a proviso that *must* carry the claim that resources are collectively owned. Indeed, as I shall contend later, consistency bars all libertarian "no-ownership" theorists from incorporating even the weaker version of the Lockean proviso into their systems. Locke, as I have already indicated, reminds appropriators why they need to be concerned with how non-appropriators are affected by their appropriation: non-appropriators share the initial resources with them.

Since Nozick holds that resources are strictly ownerless, it would be generous and morally praiseworthy if Nozickean appropriators considered the effects of their appropriation on others. However, if they did not due to their 'heartlessness', they should not be 'legally' held culpable. I will have more to say about this contentious issue later. Suffice it to say now that it is puzzling that Nozick explicitly maintains that in a libertarian world, a world where initial resources are strictly ownerless, the legitimacy of one's holdings is contingent upon the effects that one's holding have on non-appropriators.

More puzzling is Nozick's insistence that if a *legitimate* property acquisition constitutes a loss to non-appropriators, then one's acquisition instantly loses its legitimacy. In his own words: "Once it is known that someone's ownership runs afoul of the Lockean Proviso, there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) "his property"" (ASU: 180). Elsewhere, he puts it in this way, "A process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened" (Ibid 178). In effect, Nozick is saying that the validity of one's entitlement should be contingent upon the fulfillment of the requirements of the Lockean proviso. Thus, where one's property fails to meet the demands of the proviso, one automatically loses the legitimacy of that property. This is tantamount to saying that the demands of the Lockean proviso should trump considerations of the entitlement theory.

Nozick does not explain, let alone justify, why the proviso should de-legitimate an acquisition of a person whose acquisition is in accordance with the three principles that composed his entitlement theory, namely, the principles of original acquisition, transfer and rectification. Thus, it might legitimately be contended that, in invoking the Lockean proviso to place limits on legitimate holdings, Nozick is tacitly conceding that the entitlement theory lacks the immaculate moral credentials of its own. In other words, Nozick now seems to be holding that any acquisition that satisfies the entitlement theory, *but* does not satisfy the Lockean proviso is unjust. This is, without a doubt, a retraction of his earlier and repeated libertarian claim that the test for legitimate holding is the entitlement theory. In short, from the standpoint of the proviso, legitimate holding is no longer simply a matter of how one has gone about securing that holding. The Nozickean/Lockean proviso, so interpreted, contradicts Nozick's fundamental claim that legitimate acquisition of previously unowned portions of the natural world gives people absolute property rights in those portions. Thus, it can be concluded that the Lockean proviso seriously undermines Nozick's libertarian political philosophy.

One might say that I am being unfair to Nozick since he accepts only the weaker version of the proviso, a version which is different in content than Locke's. However, even if, for the sake of argument, we grant that Nozick's weaker proviso is substantially different from Locke's, the relevant issue is that his so-called weaker version still places constraints upon legitimate property. Indeed, the intent of his water hole example, as analyzed earlier, is to show that the calamity of others can limit, if not de-legitimate, one's property right. The entire water hole argument is meant to demonstrate that the entitlement theory is subordinate to his proviso.

In short, given that Nozick endorses the doctrine of "ownerlessness" of natural resources, it remains unclear what 'legal' basis he has for insisting that appropriators ought to consider the effects their *legitimate* acquisition would have on non-appropriators. Of course, Nozick has the 'moral' basis for saying that appropriators should be concerned with how non-appropriators are affected by their legitimate appropriation. In other words, appropriators are *morally* obliged to ensure that their legitimate holdings have no adverse effect on others. Thus, one might appropriately say that Nozick's version of the proviso somehow serves as a 'moral' basis for his theory. Indeed, without the proviso, there would be implications that would be morally repugnant. For example, without the proviso, legitimate water hole owners might throw away their 'excess' water while innocent people are dying of dehydration. In short, one way to avoid this undesirable implication is to install the proviso. However, if the proviso is meant to serve as a 'moral' basis, then appropriators who do not consider the effects their *legitimate* acquisition would have on non-appropriators should not be legally reprimanded.[26] In other words, the proviso cannot and should not determine the legitimacy of others' property. Indeed, Nozick's famous claim "from each as they choose, to each as they are chosen," (ASU, 160) clearly implies that Nozickean appropriators may *choose* to be 'legally' *un*concerned with how others are affected by their (Nozickeans') legitimate appropriation.

One might say that as long as no rights are violated, there are no libertarian grounds whatsoever for placing even a "minuscule" limit on one's appropriation. To be sure, it is characteristic of Nozick's libertarianism to regard as *completely* just any distribution that arises in accordance with the principles of acquisition, transfer and rectification *regardless* of who has what amount. Thus, Nozick's proviso seems to interfere with the liberty of appropriators to use their legitimate holdings as they see fit regardless of the conditions of non-appropriators. Particularly, Nozick owes us an explanation as to why there should be limits on what the water hole owner may do with his property given his own original concession that his "original appropriation did not violate the proviso" (ASU: 180).

In a nutshell, there is a *prima facie* case that Nozick's Lockean proviso undermines the fundamental tenets of the libertarian political philosophy. More specifically, the proviso significantly defeats the libertarian inviolable status of property rights. If that case stands, then there seems to be a deep incoherence in Nozick's libertarian argument as presented in ASU.[27]

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[26] Of course, one could understand natural rights with the Nozick-Lockean proviso built-in. With this construal, if one's appropriation of the water hole causes people to die of dehydration, one violates their rights, namely their right that I should do my duty as spelled out in the proviso. In short, one might say that forcing one to share one's waterhole is consistent with the libertarian theory of rights. However, the plausibility of this line of reasoning rests on the mistaken claim that the water hole owner's appropriation caused people to die of dehydration. But, as I have explained, there is nothing in Nozick's argument that remotely suggests that the water hole owner's appropriation brought about the deteriorating condition of non-appropriators. Given that others' unfortunate situation is an act of nature, appropriators cannot be held responsible for that! I will have more to say about this issue later.

Nozick's Original Communism and Egalitarianism

Given the apparent incompatibility between the Lockean proviso and Nozick's libertarianism, one might query: why does Nozick incorporate the proviso into his system? In my opinion, Nozick's endorsement of the proviso makes sense *only if* he shares with Locke the conviction that resources are commonly owned. For it is hard to find a way to interpret Nozick's-Lockean proviso as anything other than a straightforward endorsement of Locke's doctrine of original communism: the doctrine that natural resources are collectively owned by mankind in general. While Nozick insists that natural resources are initially and thoroughly unowned, he seems to be unaware of the egalitarian implications that follow from his version of the Lockean proviso: His proviso is tacitly imbedded with the claim that natural resources are owned by the members of society in some egalitarian sense, as a result, appropriation cannot worsen others' condition. Thus, it is not unreasonable to interpret Nozick's proviso to mean that because natural resources are jointly owned, other people have a moral claim with us on natural resources. Why else would he say that the legitimacy of one's holding is contingent upon its effects on others if others *have no moral claim on the natural resources!* The default assumption is that since you own natural resources with others, if others' survival is at stake, it is incumbent upon you to share your holdings with them, since the 'collectively-owned' natural resources made your acquisition/production possible.[28] Nozick's general argument, in my opinion, boils down to this: No element of the natural resources is morally attached to any single individual; therefore, no individual appropriator is morally justified in appropriating all resources to make others' condition worse off. If my reading of Nozick's proviso is accurate, then it can be concluded that Nozick's commitment to the Lockean proviso entails commitment to Locke's doctrine of original communism or egalitarianism.

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[27] While it is obvious that his post-ASU thought took new and often dramatic turnings, most commentators have not noticed the deep incoherence found in ASU. This explains why libertarians and non-libertarians alike continue to regard Nozick of ASU as an ardent defender of libertarianism.

[28] A libertarian defender of Nozick might contend that since human effort is solely responsible for exclusive appropriation, Nozick's commitment to Locke's original communism doesn't really commit him to redistributivism. I will take up this issue in Chapter 5. Suffice it to say that the claim that appropriation comes from human effort alone is empirically false, given that all acquired holdings have had elements of nature.

Nozick's 'covert communism', I believe, serves to explain why he contends that the Lockean proviso forbids monopolistic economy, insisting that one cannot appropriate the only water hole in a desert and decide unilaterally to charge whatever price one pleases.[29] Nozick's argument, so interpreted, seems plausible from the egalitarian's perspective. Indeed, egalitarians would cheerfully add that one loses the right to charge whatever price one pleases *because one does not unilaterally own natural resources which essentially make production possible*. Seen from this perspective, there is *now* a rationale for Nozick's otherwise mystified claim that one necessarily loses the right to own one's water hole if it happens that all the water holes in the desert dry up but one's own (ASU: 180). His claim can be unpacked as follows: since we are joint owners of the natural resources, the legitimacy of our acquisition should be contingent upon its effects on other "co-owners."[30]

Indeed, the mere fact that Nozick can talk about the principle of just and unjust initial acquisition lends credence to my egalitarian reading of his proviso. For to say that one's initial acquisition is just or unjust carries with it the implication that prior to acquisition, others owned that thing in common. In an unowned, up-for-grabs world, it makes no sense to talk about just or unjust acquisition. In short, the concept of just and unjust acquisition applies only to the world where resources are already owned (collectively). Indeed, Edward Feser (2005), though a libertarian and a staunch defender of Nozick, has recently argued that given that natural resources start out entirely unowned by anyone, there can be no such thing as an unjust initial acquisition of such resources. Feser therefore concludes that Locke and Nozick were mistaken to suppose that justice requires a "proviso" on the initial acquisition of property (Feser 2005).[31] However, as I have argued, if one follows through the implications of Locke's overt and Nozick's covert "original communism", according to which the earth is given to human beings in common for human sustenance, then one will see that there is a sense in which every human being has a right to the use of those resources, and thus Locke and Nozick were not "mistaken" to put certain restrictions on the acquisition and use of property.

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[29] My egalitarian or communitarian reading of Nozick seems to be supported by some of Nozick's own example elsewhere. Consider this example: if someone stumbles upon a substance which cures a disease he does not have the right to appropriate it; or if he has the right, its transfer has to be limited (even though had he not accidentally discovered it, no one else would have...(ASU: 181.) Here, Nozick seems to be saying with Rawls that since it is sheer luck that the man came about the cure of the disease, his right to it should be restricted even though he didn't violate any right. He seems to echo Rawls' dominant claim that our entitlements should not depend on brute luck.

[30] I am here expressing my agreement with Thomas Pogge: "If property rights had existed at the very beginning, then the Lockean proviso would seem to him [Nozick] to have no rationale. Nozick can solve this supposed problem by assuming, with Locke, that the institution of private property developed in a world that originally belonged to humankind in common. If so, then the proviso has a rationale: it ensures that the emergence of this institution makes no one worse off by guaranteeing to everyone a share of initial freedom that is no worse than the initial such share under the original ground rules" (1989: 60 fn 62).

If my interpretation of Nozick's proviso has been on the right track, then the upshot is that Nozick cannot, without inconsistency and implausibility, embrace the proviso and discard the initial egalitarian premise that it carries. Indeed, if Nozick rejected Locke's original communism, he would have a hard time explaining the rationale of his entire proviso. To be sure, he would have difficulties justifying his principle of initial acquisition given that the concept of just or unjust acquisition presupposes that prior to acquisition, others owned things collectively. Accordingly, against the orthodox interpretation of Nozick, (e.g., contra Wolff 1991 and Cohen 1995, Kymilicka 1990), and against Nozick's own anti-egalitarian assertions, I will maintain that Nozick follows Locke in holding that initial resources are jointly owned.

The *Ir*relevance of the 'Water Hole' Example

Even if, for the sake of further analysis, one waives this criticism and grants that Nozick's commitment to the Lockean proviso does not entail commitment to Locke's original communism, one might contend that his water hole example fails to satisfy the intent requirements of his proviso. In fact, his water hole example can be said to be absolutely irrelevant to the Lockean proviso. Let us remind ourselves that Nozick's proviso says that one's acquisition should not worsen the condition of others. With this reminder, let us return to his famous 'Water hole' argument and ask this important question: Does the monopolist Lucky water hole owner violate the Lockean proviso? In other words, does his appropriation render the situation of others worse off? Of course, Nozick's answer to this question is a resounding "yes": the Lockean proviso would not come into effect if his appropriative action did not worsen others' condition!

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[31] For more on this, see Feser's recent insightful article entitled: "There is no such Thing as an Unjust Acquisition, 2005.

However, despite Nozick's "resounding yes" answer to the above question, it is not clear *how* and *why* the Lucky Man's water hole worsens the situation of others, resulting in his violation of the proviso. Nozick's argument seems to be that as long as those who lost their water holes are now deprived of the liberty to appropriate, their condition has necessarily been worsened. While Nozick is absolutely right that their situation has been worsened, the relevant question is this: "their situation has been worsened by whom (or should I say by what?)" Given Nozick's insistence that the Lucky owner leaves others worse off by charging them for the water they previously took for free, he seems to be caught into saying that the Lucky water hole owner is responsible for others' deplorable condition. To be sure, Nozick's argument implies that the owner of the water hole commits injustice against those whose water holes have been annihilated by forbidding them to use his 'survived' water whole.[32]

That said, given that the owner of the water hole did not directly or indirectly contribute to the demise of others' water hole, justice demands that he not be held culpable. As a matter of fact, Nozick himself unwittingly absolves the owner of the water hole of any culpability or injustice when he concedes that natural catastrophe destroyed their water hole, and thus their disaster is 'no fault of his', namely, the water hole owner: "This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights" (ASU: 180). Given this concession, the question remains: why should the Lockean proviso be operative here? Why shouldn't his appropriation satisfy the requirements of the proviso regardless of others' worsened condition? ***Why should a legitimate process of***

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[32] The plausibility of Nozick's argument rests upon the assumption that the lucky owner now owns a resource that others previously held in common. Thus, the purported violation of the proviso involves his unilateral ownership of something that was collectively owned earlier. This line of argument further underpins my earlier egalitarian reading of Nozick.

his acquisition cease to confer full title because of subsequent natural developments that have nothing to do with the actions of the water hole owner?

Nozick seems to assume that a 'worsened condition' constitutes a case of injustice in acquisition, regardless of the cause of that "worsened condition". However, this assumption is simply inconsistent with the tenets of libertarianism.[33] If X's situation is worsened, it does not necessarily mean that X's right or liberty has been violated: if X's deteriorating condition is caused by an act of nature, then it cannot appropriately be said that X's liberty has been encroached upon. Put differently, if X's liberty is not violated by any 'mortal' being, then the Lockean proviso should not rule out or limit appropriation in this case. We may sympathize with X for being the victim of callous nature, but we cannot go further to say that X has suffered an injustice. As one commentator puts it, "to have a streak of bad luck is simply not the same thing as to suffer an injustice" (Feser 2004: 69). Relating this to our argument, we might say that while it is lamentable that others have lost their water hole, as long the lucky water hole owner justly acquired his holding from the *unowned portion* of the natural world, the Lockean proviso cannot be brought into operation to limit his property right.

Libertarians, including Nozick, insist that the only obstacles to action falling within the scope of right and liberty are those obstacles imposed by other *people*, and not those imposed by cruel nature. Indeed, when Nozick contends that the choices of individuals acting within their rights does not interfere with or restrict the liberty of another individual, even if those choices leave that individual worse off, (ASU: 262) he is clearly implying that the vicissitudes or misfortunes of individuals cannot limit legitimate holdings. To be sure, Nozick's Kantian side constraint view entails the thesis that if X is starving to death because, through no fault of his own, X has no property with which to sustain himself, and property holder Y is not willing either to give X work or even charity, then X's situation is unfortunate but he (X) has suffered no injustice. Y, in other words, may have violated duties of charity, but he has not violated any of X's rights.[34] Need, from libertarians' perspective, does not create a property of others.

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[33] It might be replied that since there are lots of different kinds of libertarianism, Nozick is entitled to his own 'relaxed' version, a version that requires governments to sometimes coerce the rich to help the poor even if they did not cause the poor to be poor. Of course, as I argued in Chapter one, libertarianism comes in several shapes and forms, and some are more extreme than the others. However, when Nozick argues that "individuals have rights, and there are things no person or group may do to them (without violating their rights)" (ASU: ix), it is arguable that he is rejecting the version of libertarianism that permits governments to violate peoples' negative rights. Indeed, he goes on to say that many people will reject his "conclusions instantly, knowing they don't want to believe anything so apparently callous towards the needs and suffering of others" (ibid). Obviously, he would not describe his theory as "callous towards the needs and suffering of others" if the version of libertarianism that he *explicitly* subscribes to is that 'generous' and moderate!

Given this fundamental libertarian thesis, Nozick's claim that the deplorable condition of the unfortunate water hole owners nullifies the *legitimacy* of others' full right to property can be dismissed as irrelevant to, and inconsistent with, his own libertarian political philosophy.[35] It can, therefore, be concluded that Nozick's analysis of the water hole example robs his argument against patterned theorists of any effect.

In his own defense, Nozick seems to argue that water is so necessary to life that if appropriators are legally allowed to monopolize and charge an unreasonable price, numerous non-appropriators will not be able to afford to purchase and hence would perish miserably (ASU: 179).[36] In fact, if Nozick took this line of defense, both commonsense and the legal system would be on his side. Indeed, the entire law of restitution permits even forced exchanges initiated by private parties. Necessity, according to the law of constitution, allows one person to take water from the well of another provided that is the only way to prevent dying of dehydration. The legal system is so insistent on the maxim that "necessity suspends property rights" that it treats the owner of the dock as a wrongdoer if he seeks to use force to put the intruder off his premises.[37] Thus, one might say that Nozick cannot be faulted for holding that individuals right to property/water can be violated to prevent dying of thirst. However, if Nozick concedes to this line of defense, his historical entitlement theory would collapse into an end-state or patterned theory; he would be committed to saying that those who own things necessary to life, irrespective of the history behind the acquisition, have a duty to ensure that all benefit from their appropriation. This, in turn, would cast doubt upon his entitlement theory's status as an unadulterated pure-process principle. Given that, contrary to what Nozick asserts, the water whole owner does not violate anyone's right, one is led to conclude that the water hole example is absolutely a deviation and totally irrelevant to his proviso and his entitlement theory of justice. If this deviation and incoherence is to be evaded, and if his criticism of teleological/patterned conception of justice is to be effective, Nozick must say that the proprietor of the water hole can legally deny others use of it even when others have had their water hole wiped out. Until he does that it is fair to say Nozick's libertarianism is in deep 'trouble'!

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[34] Given libertarians' rigid legality/morality distinction, they are committed to saying that although it is uncharitable to keep ones' excess water while others are dehydrated and at death's door, it is not unjust to do so.

[35] Here Nozick's point seems to be that it is sheer luck that his water hole did not dry up and hence has no right to deny others the use of it. Although Nozick does not seem to notice the kinship, his argument bears a striking resemblance to Rawls' contention that the affluent in society do not deserve full ownership of their property because their property holdings are "arbitrary from the moral point of view" (Rawls 1971: 312, c/f 72, 75, 102). Thus, one wonders whether the entire immemorial and unending dispute between Nozick and Rawls does not rest on a misunderstanding.

[36] Here Nozick seems to unwittingly join Marxists or communists in maintaining that an item of necessity should not be treated in economic terms, and especially should not have a money price on it by any single individual or few bourgeoisies. Thus, Nozick appears to reject what Marxists call "commodification." Since water is absolutely necessary for survival, Nozick comes perilously close to saying with Marxists that the state ought to take over the process and delivery of it. To do otherwise, would be to "commodify' water, which from Marxists' perspective, is both morally and legally unacceptable.

Violating Rights in guise of "Catastrophic Moral Horror"

It might be replied that since Nozick concedes that rights can sometimes be justifiably violated, my argument above does not do justice to him. Indeed, in one much quoted, and much discussed, footnote, Nozick admits that individuals might not be inviolable after all: "The question of whether these side constraints are absolute, or whether they may be violated in order to *avoid catastrophic moral horror*… is one I hope largely to avoid" (ASU: 30 fn, my emphasis). For the sake of convenience, I will refer to this passage as "the doctrine of catastrophic moral horror". Nozick might employ his doctrine of catastrophic moral horror to salvage or justify his deviation of the entitlement theory. He might argue that even though the water hole owner is fully entitled to his appropriation, restricting his right is the only way we can save lives of millions who are suffering from disastrous moral horrors. In other words, he might concede that the number of innocent people who are in 'catastrophe' forces us into doing what is otherwise illegal. To be sure, the doctrine of catastrophic moral horror, so interpreted, is consistent with Nozick's treatment of bequests in *The Examined Life*: the fortunate water hole owner, if allowed to charge whatever price he deems fit, would end up being extremely rich, while those who have lost their water hole would end up being extremely poor. Thus, it is arguable at least that restricting the right of the fortunate water hole owner is morally justified by Nozick's inheritance law or tax. It should also be pointed out that the doctrine of the catastrophic moral horror sits well with Nozick's four-layer moral structure and its principle of minimal mutilation. As we saw in Chapter two, Nozick's principle of minimal mutilation presupposes that rights can be justifiably but minimally violated or transcended in order to attain a higher moral goal. Thus, his principle would justify restriction of the right of the water hole owner since the gain in ethical responsiveness would outweigh the cost of the ethic of respect.

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[37] I am indebted here to Professor Richard A. Epstein's thought-provoking paper "One Step Beyond Nozick's Minimal State: The Role of Forced Exchanges in Political Theory" (2005).

However, if the Nozick of ASU resorts to this line of reasoning, his theory of property rights will arguably lose its "absoluteness" since a concession of a violation of right in extreme moral horror has been granted, though not explicitly. In other words, the catastrophic moral horror seems a radical departure from Nozick's "Kantian side-constraints view" which emphasizes the absolute inviolability of rights under all circumstances. It must be reiterated that Nozick disqualifies Rawls from being a Kantian precisely because Rawls' DP treats the affluent group as a means to an end and this, he thinks, is a violation of Kant's second formulation of the Categorical Imperative. Rawls, on Nozick's assessment, is not fully Kantian because his DP cannot be "continuously realized without continuous interference with people's lives" (ASU: 163). Now with this in mind, returning to our water hole episode, if the criterion for being Kantian is the absoluteness of rights or Kantian side-constraints, as Nozick chooses to call it, then since the right of the owner of the water hole is being unjustifiably violated, consistency requires that Nozick disqualifies himself from being a full Kantian.[38] One might say that Nozick fails to meet the stringent criterion he himself sets and hence fails to be a "non-patterned" Kantian. Thus, his water hole example seems to substantially undermine the repeated claims he makes about the superiority of his system to liberal redistributive theories.

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[38] A defender of Nozick might say that Nozick can cheerfully adopt this course and still be a loyal Kantian. One's ideas, the defender may insist, can be Kantian without tracking Kant in every respect. While this line of defense is plausible, it is not really available to Nozick. As I argued in Chapter three, Nozick fails to rank Rawls among Kantians precisely because, on his view, Rawls' difference principle

It might be replied that I am being unfair to Nozick since he is only making an exception where life is at stake. Admittedly, our intuitions seem to support the claim that a right to life should override absolute property rights. However, if Nozick takes refuge in this line of defense, then Rawls' DP will also have to be excluded from the class of patterned or end-state considerations, since, arguably, the lives of the worse off group Rawls' theory favors *may be* equally at stake. Thus, his theory would fall prey to the very objection it offers against competing theories. Put differently, Nozick cannot, without hypocrisy, dismiss the DP as violating the means-ends principle, while maintaining his "non-patterned-Kantian" status. Possibly, the poor or at least some of the poor whom Rawls' DP favors are those whom Nozick might consider as suffering from "catastrophic moral horror."

Admittedly, Nozick does not define what amounts to catastrophic moral horror. Nor does he even tell us how much one should suffer in order to be accommodated by the catastrophic moral horror. Nevertheless, from his example on water hole in desert, we can reasonably say that, if through no fault of their own millions of poor people are bereft of water and hence are on the verge of death, both Rawls' difference principle and Nozick's thesis of the "catastrophic moral horror" would demand that the fortunate rich water hole owner shares his/her water with the poor. Similarly, those who are threatened by death, excruciating suffering, and famine, would all be covered by the term "catastrophic moral horror" since these sufferings are, to use Judith Jarvis Thomson's language, "pretty horrible moral horror" (Thomson 1982: 56).[39] Whereas Nozick famously argues for inviolability of

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violates the right of the affluent. It is Nozick's conviction that one cannot be a Kantian and a 'right violator' at the same time. If Nozick's own theory violates the right of the water hole owner, then consistency requires him to 'disqualify' himself from being a Kantian.

[39] Nozick could invoke his doctrine of catastrophic moral horror to respond to the charge that his system is insensitive to the plight of the poor. For example, in criticizing Nozick's libertarianism, Will Kymlicka writes: "It is absurd to say that a person who starves to death is not made worse off by Nozick's system of appropriation when there are other systems in which that person would not have died..." (Kymilicka, 1990, 115-116) Since a person who starves to death would be covered by the "catastrophic moral horror", the "person would not have died" even under Nozick's system. However, as I will argue shortly, if Nozick hangs on to my line of defense, he will inevitable compromise or

legitimate holdings in ASU, in the same ASU, he seems to "hide behind" the doctrine of catastrophic moral horror to violate people's legitimate rights. Thus, he wants to eat his cake and have it!

The reader might object to my interpretation by contending that since Nozick does not tell us whether what we regard as a palpable moral horror should justify a violation of property right, I am reading too much into his argument. Admittedly, Nozick says it is an open question whether rights should be violated to prevent catastrophic moral horrors: "The question of whether these side-constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror ... is one I hope largely to avoid" (ASU: 30). However, given that Nozick explicitly mentions the possibility and willingness of letting side constraints relax on some occasions, one would have expected him to, at least, elaborate on those occasions. Alas, Nozick leaves this decisive issue quickly.

It might be replied that Nozick's conception of philosophy and his confession of a certain style of philosophy in ASU take care of my concern. More specifically, a defender of Nozick might say that since Nozick fervently believes that 'bringing up' certain intractable issues without offering solution to them is in accord with the 'business' of philosophy, my criticism above is not fair to him. To be sure, the supporter of Nozick might invoke this passage to substantiate his claim:

> This book [ASU] is a philosophical exploration of issues, many fascinating in their own right…there also is a place and a function in our ongoing intellectual life for a less complete work, containing unfinished presentations, conjunctures, open questions and problems, leads, side connections, as well as a main line of argument. There is room for words on subjects other than last words (ASU: xii).

In short, it might be said that one should not be taken aback by Nozick's failure to explicitly tell us about what constitutes 'catastrophic moral horror'— since it is consistent with his general conception and method of philosophy. At the risk of being accused of two-facedness, I must confess that Nozick's statement above essentially captures some of my own attitude in the present work. As one might have detected, sometimes I follow a philosophical problem and take flights into related topics and

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soften his side-constraint views, according to which there are no conditions under which rights can be *justifiably* infringed or overridden by competing considerations.

speculate about them. In my opinion, one should dare to take philosophical flights since philosophy not only begins in wonder (as Aristotle reminds us)—and is kept alive by it—but also because it begins with and is kept alive by the urge to speculate.[40]

That said, I believe the issue of when a legitimate property right ought to be violated for the sake of saving innocent lives is so fundamentally important in political philosophy that one wonders why Nozick tells us about all kinds of things — including when animals ought not to be tortured — but remains reticent on the details on what constitutes catastrophic moral horror. Thus, while I admire his "general conception and style of philosophy", it seems fair to say that his failure to elaborate on what amounts to catastrophic moral horror is somehow mind-blowing, so to speak. One might hazard a guess that Nozick is deliberate in his avoidance of details of this very important issue. For once he starts discussing on which occasions, why on these occasions and not on others, how much a side constraint may relax, whether some side-constraints may relax more than others, etc., he will start moving farther and farther away from the strong Kantian side-constraint view. Eventually, his entitlement theory would collapse into something like Rawls' DP. For example, if he explicitly said that those who were physically deformed and could not look after themselves constituted a moral horror, we might invoke that to justify coercive redistribution. His minimal state would then be expanded automatically since the state might ensure that those suffering from physical deformity (catastrophic moral horror) are being provided for. Thus, it is understandable, though 'unforgivable', that he does not discuss, nor takes a stand on, such pivotal topics.

However, the important thing is that by merely considering whether rights should be treated as absolute should an individual face the possibility of extreme catastrophe, Nozick seems to acknowledge that rights are not absolute after all. Why would he bring it up if rights were unassailably inviolable! Indeed, whereas elaborative Nozick in *Anarchy State and Utopia* not only hopes (he says) largely to avoid but also does largely avoid the issue of catastrophic moral horror, in the earlier

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[40] It has been said that a philosopher is like an adult who, because he never gets tired of asking question that other adults would consider both childish and strange, is stuck in childhood.

"On the Randian Argument" there is a long note in which he provides more information. There, he says that he "ignore[s] questions about whether sometimes you are allowed to violate rights of innocents in order to prevent monstrous deeds by others." *But* he quickly adds that, "perhaps avoiding great moral horror swamps people's rights, so that one would be justified in doing something one knew would kill innocent people, in order to stop the moral horror (Nozick, "On the Randian Argument": 224 n2). In fact, in one of his Post-ASU writings, Nozick states in no uncertain terms that rights are not "categorically exceptionless", implying that rights can sometimes be justifiably violated: "there is no exceptionless principle to the effect that any action with such a feature is impermissible, for having such a feature can be counterbalanced by having some other feature—call that a "right-making feature"" (1981: 479). Here, Nozick's essential point seems to be that since rights do not enjoy the status of being "categorically exceptionless", there is no such thing as a complete absolute right!

Since Nozick obviously grants the possibility of exceptions in extreme situations, one might say that there are no absolute rights in him. Put differently, since Nozick believes that rights *could* be overridden to avoid some catastrophe, and since rights which are absolute are not overridable, (overridden rights cannot be absolute!) he cannot be ranked among thoroughgoing libertarian absolutist theories. My interpretation of Nozick as not being an absolutist is in accord with Alan Gewirth's definition of an absolute right: "A right is absolute when it cannot be overridden in any circumstances" (Gewirth 1984: 95).[41] It is therefore fair to say that absolute rights which "entertain" exceptions even under extreme moral tragedies lose their "absolutism". If my line of argument is correct, then Nozick can no longer sustain his famous "absolutist" statements including: "side constraints express the inviolability of other persons" (ASU: 32) "individuals are inviolable" (ibid. 31). It is not unfair to say that in his considered view in ASU, rights are not 'trumps" or "side-constraints" in the sense that they are final moral claims on action. It can therefore be concluded that in "welcoming" the "catastrophic moral horror" into his theory, Nozick is committed to saying "farewell" to his absoluteness of rights.[42]

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[41] Samuel Scheffler puts it this way: "in order to be an absolutist… one must also hold that it would be impermissible to torture one child to death even if that were the only way to prevent, say, everyone else in the world's being tortured to death" (Scheffler 1994: 86 fn. 3). Though the general point is here clear enough, one would prefer a less implausible example than this one; that is, in being so unrealistic *this* example does not serve very well to bring out the problems which haunt an absolutist's position.

Against my interpretation, one might say that Nozick can "relax" rights in extreme moral horror and retain his "absolutism" by contending that rights are *not* absolute in times of catastrophic moral horror. My imaginary critic might bolster his argument with this illustration: X is a billionaire who has hoarded plenty of food in a farming community, a community where numerous people, including children are dying as a result of unexpectedly prolonged famine. All the inhabitants, except for the billionaire, have had their food withered and destroyed. In this unfortunate situation, a defender of Nozick as an absolutist might say that governments do not violate X's right by "forcing" X to share his food with those who are dying of starvation. This is so because X's *absolute* right to his food does not cover situations of acute starvation, to begin with. Thus, X's right to his food does not *give way* in the face of catastrophic moral horror i.e.; severe famine; rather, his right to his food can be said not to have the *weight* necessary to withstand the pressure from cataclysmic situations.

Admittedly, if we interpret Nozick as holding that rights are absolute *only* within "*non*-catastrophic" situations, then Nozick can, without inconsistency, hold his doctrine of catastrophic moral horror in tandem with his libertarian "absolutism". However, if we say that rights are absolute in the sense that they do not cover catastrophic situations, then, surely, the competing theories, including Rawls' difference principle, (which, for Nozick, is clearly the paradigm of a patterned theory) would all "qualify" to be associated with the theory of absolutism. Rawls, in particular, could say that his theory of rights is absolute with respect to non-catastrophic cases but extraordinary moral tragedy may sometimes justify "relaxing" the otherwise absolute rights! Indeed, this has been an argument of Dworkin, one of the ardent egalitarians. In his *Taking Rights Seriously*, Ronald Dworkin calls rights "trumps" precisely because he believes rights are "trumps" with respect to ordinary matters of utility gain or loss (what I have called non-catastrophic moral horror), but extraordinary social costs or conflicts (what Nozick would call catastrophic moral horror) with competing rights may sometimes justify setting rights aside (See Dworkin 1975: xi, 191-192).[43] In short, if rights were not absolute in the sense of covering extraordinary moral horrors, then most, if not all, moral and political theorists would be absolutists! The yardstick for being an absolutist would become "a piece of cake". It is clear that Nozick and libertarians would not endorse this flexible and accommodating definition of absolutism. Indeed, when Nozick contends that *even* the right to life cannot justifiably trump property rights, he is clearly implying that absolute rights cover both catastrophic and non-catastrophic moral horrors! If so, then we might say that Nozick's doctrine of the catastrophic moral horror cannot be made to cohere with his absolute conception of rights or the Kantian side-constraints view, as he prefers to call it. If my analysis is right, then Nozick can no longer sustain his 'deontological" claim that rights ought to be respected, *no matter what!* His matured view seems to be that rights can justifiably be *encroached* upon in times of moral tragedies.

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[42] I am here disagreeing with A. John Simmons who has argued that "even Nozick, strongly committed to the absoluteness of rights in *Anarchy, State and Utopia*, seems to have softened his stance [in his] (*Philosophical Explanations*, 479) (1992: 94 fn 77) My contention has been that Nozick softens his absolutism *even* in ASU. His endorsement of the Lockean proviso in ASU, together with his doctrine of "catastrophic moral horror" also in ASU, commits him to rejecting his own theory of absoluteness of rights.

That Nozick system allows infringement of rights is further supported by his apparent willingness to permit the occasional inflicting of minor bodily and emotional harms even on *non-consenting* innocents. Nozick seems to hold that rights can be violated to forestall agonizing sufferings. There are some textual grounds to construct a prima facie case for this claim. Consider this passage:

> Can't one save 10,000 animals from excruciating suffering by inflicting some slight discomfort on a person who did not cause the animals' suffering? One may not feel that the side constraint is not absolute when it is *people* who can be saved from excruciating suffering. So perhaps the side constraint also relaxes, though not as much, when animals' suffering is at stake (ASU: 41).[44]

Once again, although Nozick does not say how much the side constraint may relax in the case of saving animals, or indeed whether the side constraint may relax at all, he would not raise the issue if he did not think it should relax!

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[43] He repeats this point in his *Rights as Trumps* (1984).

[44] Here Nozick seems to join the animal right activists in condemning those who maltreat animals. Since animal eaters inflict pains on animals by killing them, he seems to be recommending vegetarianism to us.

At the risk of being accused of speciesism, I would say that if 10,000 animals suffering excruciating pain counts as catastrophic moral horror, from Nozick's standpoint, then all those who are victims of circumstances beyond their control, and thus are in dire human need would "qualify" to be covered by Nozick's doctrine of catastrophic moral horror.[45] In fact, in his later writings, he reminds us of the possibility of violating rights in extreme cases, suggesting that he is conscious of the possibility of violating legitimate rights. "In *Anarchy, State and Utopia*, I elaborated a view treating side constraints upon action as exceptionless within a deductive structure but with one cautionary footnote (p. 30) about possible exceptions in extreme situations" (1981: 734, fn74). Thus, it is fair to say that his claim about the possibility of violating rights in ASU is more than a slip of the pen.

To sum up, Nozick cannot sustain his doctrine of catastrophic moral horror as well as his version of the Lockean proviso, without undermining his reasons for rejecting patterned theories or end-state theories. Indeed, since the Lockean proviso indisputably places limits on legitimate property rights, in accepting the proviso into his theory, and in making the plausibility of his argument rest on the proviso, Nozick has already infected his own libertarian views with just the same sort of redistributivism and welfarism he virulently impugns. Thus, Nozick's entitlement theory is, arguably, no longer substantially different in character from Rawls' Difference Principle, a principle which Nozick repeatedly and vehemently disparages.

Since Nozick suggests that the yardstick for being an "unpatterned historical" theorist is a belief in absoluteness of rights, and since his version of the Lockean proviso is meant to place limits on the right to appropriate, in order to be consistent, he *must* either align himself with patterned theorists or he must recant his criticisms against them. Indeed, he has a third option, namely, to dissociate himself from the Lockean proviso. However, this option would not be palatable to him either. Since Nozick, by his own admission, cannot give up the idea of the Lockean proviso without jeopardizing the plausibility and coherence of his theory, we are led to the conclusion that his negative assessment of *all* patterned theories is arguably self-referentially incoherent.

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[45] As Judith Thomson aptly queries, "if dire human need does not override a right, what on earth would"? (Thomson, in Paul 1982: 136).

The Benefits of Capitalism: A Covert Attempt at Reconciliation

Nozick has struggled to make his absolutism cohere with the Lockean proviso by contending that the advantages of capitalism would render the application of the Lockean proviso nugatory. To strengthen his argument, Nozick spells out numerous advantages of capitalism. Let me quote him at length:

> [Capitalism] increases the social product by putting means of production in the hands of those who can use them most efficiently (profitably); experimentation is encouraged, because with separate persons controlling resources, there is no one person or small group whom someone with a new idea must convince to try it out; private property enables people to decide on the principle and types of risks they wish to bear, leading to specialized types of risk-bearing; private property protects future persons by leading some to hold back resources of employment for unpopular persons who don't have to convince any one person or small group to hire them, and so on (ASU: 177).

Nozick point seems to be that since capitalism compensates non-appropriators, it satisfies the requirements of the proviso. Consequently, in opposition to my interpretation, Nozick adamantly insists that his absolutism/capitalism and the Lockean proviso are happy allies. In other words, he believes the two will never run into conflict. He writes: "I believe that the free operation of a market system will not actually run afoul of the Lockean proviso" (ASU: 182). In short, Nozick believes that private appropriation that generates absolute entitlements is morally permissible because the operation of the system of property that emerges from individual appropriations is not to the net detriment of anyone. The import of Nozick's argument is this: since absolute capitalism is advantageous to all, the Lockean proviso should not debar an individual from unlimited acquisition. To be sure, he sanguinely insists that because of the overall benefits of capitalism the "proviso (almost?) never will come into effect" (ibid. 179). Since, in practice, the proviso will hardly ever kick in — because the market makes everyone, including the poor, better off than they would have been if private property didn't exist[46] — Nozick heroically believes he has succeeded in establishing the compatibility between the Lockean proviso and his absolute theory of rights or entitlement theory.

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[46] Libertarians denigrate communism with this joke: "communists really must love poor people—after all, they produce so many of them" (Feser 2003: 19).

However, the benefits of capitalism, I contend, cannot absolve Nozick of my charge that his proviso illegitimately places limit on people's licit property right. Indeed, I will demonstrate that his argument disastrously fails to disarm my objection. To start with, Nozick's argument seems to lack empirical warrant or proof. Indeed, his detractors have no reason to share his tremendous faith in the free market. Since proponents of socialism and communism equally claim that their ideologies are beneficial to everybody in the community, Nozick gives us no grounds for accepting his claim over that of socialists or communists. His argument presupposes that between two systems, (call them A and B) if B is more beneficial than A, then B is acceptable, a presupposition which flies in the face of his contention that capitalism is inherently superior to all rival ideologies.[47] In short, until and unless he proves that his system of unlimited property rights actually provides significant benefits, at a reasonable cost, and does so better than other systems that might be put into effect, he gives us no reason to subscribe to his line of reasoning.

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[47] Against my interpretation, one might say that Nozick's libertarianism does not necessarily require capitalism. Admittedly, Nozick rejects the supposition that there is one best form of society or ideology for everyone, and thus proposes a "meta-utopia", that is, a framework for many diverse utopian experiments. This means that within a libertarian community, people may voluntarily adopt any ideology of their own choosing. Presumably, Nozick would say any political ideology that is a product of consent is consistent with his libertarianism. This suggests that, in a Nozickean society, "voluntary socialism" or "voluntary communism" or a combination of both can coexist with capitalism. Thus, Nozick might conclude that a libertarian society need not be a capitalist state. As he puts it: 'Though the framework is libertarian and laissez-faire, *individual communities within it need not be*, and perhaps no community within it will choose to be so. …In this laissez-faire system it could turn out that although they are permitted, there are no actually functioning 'capitalist' institutions' (320-321). It is clear from this that in a libertarian society, people *could choose* to be socialists or even communists or "welfarists" and *willingly* pay taxes to ameliorate the conditions of the poor. To be sure, given libertarians' claim that voluntary contract can legitimate any kind of nonpolitical arrangements, including even slavery, they are committed to saying that free contract can, and indeed should legitimate all forms of non-minimal political arrangements. Having said this, I insist that some of Nozick's assertions commit him to saying that only capitalism is intrinsically valuable. For example, when he avers that even in the purest socialist society, if citizens are granted full liberty, society would inevitably generate into a purest capitalist state (ASU: 163) he is obviously implying that liberty and capitalism are inextricably linked. Indeed, in his article, "Who Would Choose Socialism" (1978), Nozick makes it clear that all lovers of liberty, namely, libertarians, would have no choice but to embrace capitalism. As a matter of fact, he presents a concrete example to buttress this point: In Israel, he contends, where the existence of the Kibbutz offers people a genuine choice between socialism and capitalism, only fewer than 9 percent of the entire population has opted to live under socialism. The bulk of the population value liberty, and thus have chosen to live under capitalism (ibid 22-3). Nozick's argument there seems to suggest that libertarianism is not merely compatible with, but requires, a purely capitalist state. This is tantamount to saying that libertarianism and socialism are conflicting ideals.

More significantly, Nozick is not entitled to resort to the "benefit of capitalism" argument, having argued against Rawls' and Hart's "Principle of Fairness." Following H.L.A. Hart, Rawls argues in favor of what he calls "the Principle of Fair Play" or "the Principle of Fairness", according to which "a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating" (Rawls 1964: 9-10, C/f Hart 1955: 185). Nozick rejects Rawls' Principle of Fairness as unjustifiably coercive, since, from his point of view, the principle imposes benefits and involuntarily-imposed duties on people. Nozick is explicit in his rejection of the general view that we "owe" something to the society we live in just because we are to some extent social products: "the fact that we partially are "social products" ... does not create in us a general floating debt which the current society can collect and use as it will" (ASU: 95). The crux of Nozick's argument, if I understand him correctly, is that others are *not* morally justified in forcing any scheme they like on us, with the concomitant obligations. To be sure, Nozick is explicit and emphatic that nothing is owed in virtue of unsolicited benefits conferred. Following the logic of his own argument, it can be said that, since non-appropriators have not consented to the benefits that flow from capitalism, it cannot serve as *genuine* compensation to them. The benefits can be said to be "open" or unsolicited in the sense that they cannot avoid receiving them. Since the unsolicited benefits received by non-appropriators cannot legitimate absolute rights, non-acquirers are not duty bound to respect the absolute property rights of others.[48]

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[48] Nozick's argument against Rawls/Harts' principle of fairness seems to harmonize with his argument against democracy. Both arguments share one fundamental thesis in common: The majority cannot be morally justified in forcing any scheme and obligations on the minority. In ASU, Nozick unreservedly rejects any imposition of the will of the majority on the individual (See ASU: 167-174). Given that the "benefit of capitalism" argument carries with it the tacit assumption that the majority can justifiably impose the values or benefits of democracy on the 'unconsented' minority, if Nozick employs that argument to defend his theory of rights, then one might justifiably question the sincerity of his entire argument against democracy. In other words, if the benefits of capitalism can legitimate property right, then the benefits of democracy can equally legitimate democracy. Thus, Nozick cannot consistently endorse the one and repudiate the other.

Indeed, since Nozick's libertarianism involves the claim that infringements of rights are always wrong irrespective of the consequences, he cannot appeal to the benefits of capitalism to reconcile his absolute conception of rights with the Lockean proviso. Doing so would seriously undercut his deontological libertarianism, according to which rights always should trump all considerations of others' welfare in the community. It is worth emphasizing that natural right libertarians, including Nozick, defend capitalism, not as efficacious but as the *only* moral economic system which respects individual inviolable rights. Nozick famously insists that liberty, as opposed to utility, requires capitalism. As well, he invokes liberty as the decisive ground for rejecting patterned conceptions of justice. Given Nozick's insistence that the value of liberty trumps any consideration that capitalism might bring about, he is committed to saying that capitalism would be acceptable *even if* it were an inefficient structure or an ineffective way of benefiting non-appropriators.

Indeed, if Nozick hangs on to his "benefits of capitalism" argument to salvage his theory of absolute rights, he will be vulnerable to a more intractable problem: his anti-consequentialist libertarianism would inevitably collapse into consequentialism. For he would be saying, with consequentialists, that the benefits of capitalism are a *necessary* condition for legitimacy of capitalism. In short, he would be open to the charge that his libertarianism is disguisedly teleological in nature.[49] This would mean, paradoxically, that his deontological libertarianism is essentially teleological! That is, he would be committed to holding the *anti*-libertarian view that the state has the moral license to interfere in the market economy if doing so would result in *more* efficient economy.

In sum, although the "benefits of capitalism" argument seems to preserve Nozick's absolute conception of rights, it does so at the cost of making him a consequentialist. Since Nozick openly regards the doctrine of consequentialism as anathema, and since he cannot square his absolute conception of rights with the Lockean proviso without recourse to consequentialism, it is legitimate to say that he woefully fails to salvage his absolute entitlement theory. Accordingly, my indictment that his endorsement of the Lockean proviso, with its egalitarian premises, is incompatible with his libertarian political philosophy in general, and his entitlement theory in particular, should be made to stand.

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[49] G.A. Cohen, for example, has contended that "it is an illusion" to regard Nozick's theory as deontological since "theses about consequences are foundational to Nozick's defence of private property rights" Cohen, "Nozick on Appropriation" in *New Left Review*, vol. 150, p. 100. Nozick insists that his claim that the practical benefits of capitalism is consistent with the requirement of the Lockean proviso is not a utilitarian, as opposed to rights-based, defense of property. Rather, he maintains that it merely provides grounds for holding that the Lockean proviso has not been violated. However, given the emphasis he places on the "benefits" of capitalism to defend his endorsement of the Lockean proviso, it is extremely difficult to exonerate him from Cohen's charge.

Libertarianism Minus the Lockean Proviso

Some libertarians, including Jan Narveson, have shown some awareness of the seemingly redistributive and egalitarian implications of Nozick's libertarianism in general and his Lockean proviso in particular. Accordingly, they have fought to exonerate libertarianism by dispensing with the Lockean proviso, with its accompanied theory of compensation, as a constraint on legitimate appropriation.[50] The remainder of this section will be devoted to examining some of the considerations that purportedly support the view that libertarians can get along *without* the Lockean proviso, and the theory of compensation mandated by the proviso. The bulk of the section will analyze the arguments of Jan Narveson (1988, 1999), one of the most ardent and articulate current advocates of this view. My conclusion will be that the Lockean proviso, though incongruous with the libertarianism, cannot be rejected without sacrificing the intuitive plausibility of libertarianism.

The gist of Narveson's argument is as follows: since natural resources belong to no one, exclusive appropriation of them does not constitute an encroachment of non-appropriators' rights; consequently, non-appropriators deserve no compensation. Narveson's position comes out most clearly in this passage: "in taking something from the "state of nature", we are not taking anything from anyone, since it belongs to no one. There are no valid claims to compensation" (Narveson

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[50] Narveson, for one, does not try to rescue the proviso from the charges that it is an end-state theory. Instead, he dismisses the proviso as inconsistent with the tenets of libertarianism. While I argue that Narveson is right, I shall argue shortly that the plausibility of libertarianism rests substantially on the Lockean proviso.

1999: 217). The thrust of Narveson's argument is his claim that since appropriators use resources that belong to no one, non-appropriators' rights cannot be said to be violated by others' appropriative action. In other words, since resources are ownerless, exclusive appropriation cannot negatively alter non-appropriators' rights. Consequently, no one can legitimately claim to have been deprived of access to antecedently existing resources. To quote him once again:

> An act A is an illegitimate interference with S's liberty only if S has a right that A not be done. But to say that x is unowned is just to say that no one has rights with respect to x. So if x is unowned, exclusive appropriation of x is not an illegitimate interference with anyone's liberty (1988: 85).

In his other writings (1999, 2002) Narveson has repeatedly insisted that since resources are unowned, exclusive appropriation on them is not an illegitimate interference with anyone's right to liberty. The plausibility of his entire argument rests on the assumption that *if a thing is unowned by an individual, then no one has a right to that thing.* It is this assumption that I intend to take to task. In my opinion, Narveson's argument is rather weak because if the right to use *unowned* natural resources is conceived as part of the *general* right to liberty, then *exclusive* appropriation could and would violate peoples' general right to liberty. Contrary to what Narveson avers, from the fact that X is unowned, it does not remotely follow that no one has any rights over X which would not be interfered with by exclusive appropriation. This is so because there may be rights to use X as part of the general right to liberty that would be violated by exclusive appropriation. This being the case, Narveson's claim that "to say that x is unowned is just to say that no one has rights with respect to x" (ibid. 85) can be dismissed as a *non sequitur*. The problem with Narveson's argument is that he does not even consider whether in a state of nature the right to use unowned resources should be thought of as a general right, rather than as individual right. Until that possibility is completely ruled out, however, it is not apparent why we should think that any single individual could acquire absolute property rights without violating others' rights.

It might be replied that since in the state of nature, the first user and possessor of a good is the legitimate owner, the right to use unowned resources cannot or should not be thought of as a general right. Coming back to our example, it might be said that since X was the first person to lay hands on the resources, Y must not be compensated for, for being late. However, this line of defence raises some serious troubling questions: why should being there first always be trumps as regards general liberty? Why should the first person to acquire some part of the material world unilaterally exclude others from it without compensation? Narveson's answer to this question is a familiar one: since X is the first user and possessor of a good, Y (being a latecomer) cannot legitimately complain. But, again, this line of reasoning makes it puzzling why we should think that X has a full property rights by virtue of the fact that he (X) was first to acquire that property. Why think that any activity someone may engage in counts as full property right, rather than as simple taking which implies limited rights. To be sure, our intuitions tell us that mere first occupancy is clearly insufficient to possess absolute ownership of an object. To suppose, for example, that I can come to owned a piece of land just by being there first seems absurd.[51]

Given that our intuitions and commonsense appear to go against Narveson's first occupancy principle, it is not clear why he thinks Y cannot legitimately complain for showing up "late"[52]. In fact, Y can complain that X having been in the right place at the right time does not seem to be a good reason why X gets to have control over material things. In short, Narveson gives us no compelling argument justifying why his first possession principle should confer absolute property rights. Indeed, if Narveson's first use and first occupancy principle became a universal rule, numerous slow runners, not to mention the physically handicapped, would perish unnecessarily; while a few gifted sprinters and marathon runners with keen eyesight would obviously amass undue material resources. As James Tully dramatically puts it, "first possession principle turns possession into a race in which the slower are disadvantaged" (Tully 1980: 87). Henry Brackenridge expresses the same point as follows: "if the first occupancy principle were true, "a single tribe could claim an entire continent once they had pursued an antelope across it" (Brackenridge in Washburn, 1964: 113) and such a situation would yield absurdity. It sounds extremely odd to award full ownership of a thing to the party who just captures it first.[53]

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[51] My argument here should not be taken as a repudiation of aboriginal rights of North America. Rather, my argument is directed against those who maintain that mere first occupancy is sufficient to possess absolute ownership of an object. I believe every human being requires access to material resources if s/he is to flourish; therefore, I am all for aboriginal rights. However, as we all know, aboriginal rights are not absolute. Indeed, aboriginal title is viewed as a usufructuary right of occupancy alienable to the Crown. Given that aboriginal rights are extinguishable by unilateral acts of the Crown (i.e., the federal government), they are far from being absolute rights. To be sure, we can plausibly distinguish Aboriginal title from individual property right: the former, unlike the latter, is a communal right. Accordingly, aboriginal rights are immune from my criticisms (of absolute rights).

[52] It might be replied that we cannot always depend on our intuitions to settle contentious ethical and political issues. While it is true that our intuitions are not always capable of being our sole final arbiters, it is not unreasonable to say that any acceptable and plausible theory should not be radically incompatible with our intuitions.

Even if we waive this criticism and grant that Narveson's first occupancy principle legitimately places no circumstantial restrictions whatsoever on appropriation, his libertarianism cannot stand without Nozick's-Lockean proviso. This claim is motivated by the fact that, in a state of nature, it is virtually impossible to exercise one's absolute right without limiting or violating the right of others. This is because when rights are exercised in the state of nature, they are usually exercised on others' legitimate property. Thus, the only way to exercise one's absolute right without infringing upon the rights of others is to "incarcerate" oneself in one's room! As Nozick seems to recognize, "a person might trap another by purchasing the land around him, leaving no way to leave without trespass. It won't do to say that an individual shouldn't go to or be in a place without having acquired from adjacent owners the right to pass through and exit" (ASU: 55). Nozick's point seems to be that as long as human beings are not ethereal creatures floating in some abstract universe, we cannot exercise our freedom of movement without violating the rights of landowners, hence the necessity of his principle of compensation.

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[53] The first occupancy principle seems to have the disturbing implication that citizens born after all the common resources have been appropriated by "first occupants" have no grounds to complaint; they are just out of luck! This seems intuitively implausible and extremely unfair, to say the least. 'Lucky' appropriators may be extremely wealthy, while others are devoid of property. These "undeserved" differences, as Kymlicka rightly noted, "will be passed on to the next generation, some of whom will be forced to work at an early age, while others have all the privileges in life" (2002: 118). Indeed, as we saw in Chapter two, in his *The Examined Life*, Nozick is sensitive to the criticism that allowing property owners to dispose of their assets to whomever they please will bring about extreme inequalities which could be unfair and even detrimental to others. He therefore proposes a "patterned" principle called "subtraction rule" as a legitimate way of dealing with unfair inequalities brought about by bequests (TEL 30-31). For more on this, see Chapter two.

Since Narveson's system is antithetical to the principle of compensation and the Lockean proviso, in Narveson's libertarian world, a world with very extensive private ownership of land, many peoples' freedom of movement might be severely restricted. This is because landowners' rights would necessarily prevent numerous people from making use of their freedom of movement. It follows that in a Narvesonean world, freedom of movement might be virtually valueless: what is the worth of freedom if it cannot be exercised! Nozick, I think, can handle this apparent difficulty by appealing to his proviso. Since, as we saw earlier, his proviso excludes someone's appropriation of all the drinkable water and also excludes his/her purchase of it all in the world, (ASU: 179) it will also definitely exclude the possibility of one single individual or a few individuals purchasing all the land in a Nozickean libertarian world, and thereby restricting others' freedom of movement. Nozick is absolutely right that without the Lockean proviso, "a person might trap another by purchasing the land around him, leaving no way to leave without trespass" (Ibid 55). In other words, "the proviso will "provide [an] opportunity for state action" (ibid 182) and so the (minimal) state, in this case, is permitted, I take it, to override A's property rights in order to let an entrapped individual B move about on A's land *without A's consent*.

Accordingly, it can be said that the Nozickean citizens, unlike the Narvesoneans', can exercise their freedom of movement though *at the cost of limiting the rights of landowners*. Since Narveson rejects Nozick's-Lockean proviso, he seems committed to "immobilizing" his citizens. Given that freedom of movement is one of the core values of libertarianism, Narveson's entire argument appears counterintuitive: In Narveson's libertarian world, if you are very rich, you can, with legal impunity, severely restrict my freedom of movement by purchasing close to every land around me. Since I cannot exercise my freedom of movement by flying, to respect your right to your legitimately acquired land, I ought to remain immobile. Nozick is realistic enough to concede that "the adequacy of libertarian theory cannot depend upon technological devices being available, such as helicopters able to lift straight up above the height of private airspace in order to transport him away without trespass" (ibid. 55). Thus, while Narveson's rejection of the Lockean proviso seems to make him a *more* consistent libertarian than Nozick, his argument against the proviso, alongside the principle of compensation, makes it impossible for his citizens to exercise their freedom of movement — since doing so would violate the right of landowners. Simply put, Narveson's repudiation of the Lockean proviso only makes him consistent at the price of making him intuitively unconvincing. Hence, Nozick will be ill served by any attempt to discard the Lockean proviso. Indeed, one might plausibly say that all lovers of freedom of movement, including libertarians, cannot avoid having recourse to the Lockean proviso, a proviso which limits legitimate property right.

Narveson might try to dance around this apparently disturbing consequence of his libertarianism "without the Lockean proviso" by insisting that the scenario described above is purely hypothetical, and that in the real-life world, people do not trap others by purchasing the land around them. Indeed, consistent with his contractarian libertarianism, he might add that we have prudential reasons to abide by conventions allowing people to freely exercise their freedom of movement. However, the mere fact that his version of libertarianism allows for the possibility of nullifying others' ability to move freely, even in the abstract, should suffice to give us pause. Moreover, this is not only an abstract possibility—there are some people who have, in reality, purchased nearly all of the land around others, and have in fact prevented them from making good use of their freedom of movement. The pressing question for Narveson now is whether we should override others' property rights in order to let those entrapped individuals to move about on others' land without their consent. No doubt Narveson would reply that we all have good pragmatic grounds for allowing others to walk on our legitimately acquired land because if we all did that we would all be able to exercise our freedom of movements. But, again, this misses the point. The problem is that Narveson has no way of showing that those who entrap others by purchasing land around them and have good pragmatic grounds for *not* allowing others to move about on their legitimate acquired land commits an injustice against those entrapped.[54] Thus, Narveson's version of libertarianism seems to go against our intuition and commonsense.

It should also be pointed out that the Lockean proviso, though inconsistent with libertarianism, is intuitively plausible for the proviso ensures that the poor are not denied the right to the use of the natural resources. As we noted before, Locke argues for natural right to property on the basis of his proviso. He rightly invokes the proviso to refute Filmer's doctrine of patriarchalism and royal absolutism which asserts that there are natural superiors on earth and hence some individuals have no right to private property. Since, according to the Lockean proviso, the natural resources do not belong to any single individual or group of people, no one can justifiably deprive others of its use without compensation. The Lockean proviso carries with it Thomas Jefferson's principle "Equal rights for all…special privileges for none". The proviso, so interpreted, can be said to serve as the normal starting point for conceptual justifications of individual rights to property. To deny the common ownership premise, in my opinion, is to affirm that some are inherently superior to others or some people are more privileged than others and this radically runs afoul of the doctrine of natural right. In short, the doctrine of original communism, I believe, is very crucial to any theory that attempts to argue for the natural equality of all human beings.[55] This being the case, libertarians who reject the Lockean proviso, with its accompanied doctrine of original communism, would render themselves susceptible to the charge that they are "Filmerians" (Held, 1976, Fishkin, 1979).

In short, abandoning the proviso appears to have the consequences of collapsing the entire libertarian edifice into feudalism and patriarchalism, the very ideologies libertarians vehemently upbraid. Since a rejection of the proviso would be tantamount to a rejection of Lockean natural rights, the basis of Nozick's libertarianism, asking Nozick to jettison the proviso is the same as asking him to square the circle. Nozick cannot, on pain of inconsistency and implausibility, relinquish his attachments to the Lockean proviso and the initial communal premises that it carries. Consequently, the redistributive and egalitarian implications of Nozick's-Lockean proviso must be allowed to stand.

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[54] Notice that the affluent who entrap the poor by purchasing the land around them do not violate their right to freedom of movement. As long as the affluent acquired their land legitimately, they act within their right, hence they can choose to entrap the poor permanently!!

[55] Thus, it is not surprising that Locke and other liberal philosophers invoked this doctrine to argue against Filmer's theory of absolutism and feudalism. Kant endorses Locke's notion of original common ownership when he contends that: "No-one originally has any greater right than anyone else to occupy any particular portion of the earth...that *right to the earth's surface…* the human race shares in common" *Kant Political Writings*, P.1 06).

Chapter 5

Taxation, Self-Ownership and Property Right

Introduction

Having argued that Nozick's commitment to a version of the Lockean proviso entails commitment to redistribution, and having further contended that libertarians who try to distance themselves from the Lockean proviso succeed in doing so at the price of rendering their argument intuitively implausible, Chapter 5 explores the implications the thesis of self-ownership has for the theory of property rights and redistribution through taxation. More specifically, I will look into the plausibility of presenting property in material things as a natural extension of self-ownership. In pursuing this goal, several questions and suggested answers will be confronted: How can self-ownership yield property ownership? Does self-ownership entail sanctity of individual property rights? Is taxation an unjustified interference with peoples' actions? One of the chief aims of the chapter is to disparage the libertarian idea that redistributive taxation necessarily violates self-ownership. My overall contention will be that the doctrine of self-ownership, as construed by libertarians, underdetermines questions of ownership in external resources, and that taxation and welfare programs need not violate self-ownership.

The Origin of the Doctrine Self-Ownership

Most libertarians, if not all, justify individual property on the basis of self-ownership: a right to do *whatever one chooses* with what is one's own. Libertarians insist that people control their own lives provided they possess the rights constitutive of self-ownership. The right of self-ownership, which is pivotal in Nozick's theory of property, is said to originate with Locke. The core of Locke's theory of self-ownership is said to be his celebrated claim that: "Every Man has a *Property* in his own *Person*. This no Body has any Right to but himself" (II, 27).

That said, I think Locke cannot be accredited as an unconditional self-ownership theorist since he also fervently believes that the ultimate foundation of the thesis of self-ownership is God. Libertarians, including Nozick, believe self-ownership legitimates *all* consenting actions. Indeed, self-ownership and consent, it is said, are definitionally related: nothing can be done to a self-owner without consent; and anything can be done to a self-owner with consent (Daniel Attas 2000: 13). Contrarily, in Locke, consent is sometimes subordinated to other considerations, particularly to the will of God.[1] For example, despite Locke's explicit assertion that we are self-owners, he also unequivocally states that we are all owned by God: "Men being all the Workmanship of one Omnipotent, and infinitely wise Maker… *they are his Property*" (II, 7, my emphasis). Thus, it appears Locke endorses two antipodal statements simultaneously:

1) We are the products of God's workmanship; we are the products of God (What I call Locke's "God-ownership" thesis).

2) We all have property in our own persons; we are absolute Lord of our own persons and possessions (The so-called self-ownership thesis).

One may wonder how Locke can make these two seemingly diametrically opposed assertions at the same time. The above apparent contradiction, I think, could be explained away if we viewed Locke's thesis of self-ownership from two different perspectives: From the point of view of our relationship with other men and from the standpoint of our relationship with God. When Locke says that we have property in our own persons, I think he is referring to "man to man relationship". I have every liberty to employ my labor as I choose because the labor is mine. My property includes a right to be free of the control of others; and no one (except for God) can licitly use my body or labor without my express consent. However, this does not imply that I can choose to end my life, because when it comes to my life, the relationship transcends from man to man to man to God. God being my proprietor, I cannot, by my own free consent, alienate or relinquish my life for it is simply not mine. It is simply *beyond* my power to take away my life, or ask somebody else to take it. Seen from this perspective, it seems reasonable to say that, in Locke, the doctrines of self-ownership and "God-ownership" are not mutually exclusive: The fact that I am owned by God does not follow that I am owned by my fellow man. Though my body is ultimately God's property, no other mortal beings, *apart from me*, have any rights over it. God can control my property *but* my fellow human beings have no right to meddle with my property.[2] Locke's argument, so interpreted, is neither preposterous nor bizarre. Indeed, while Christians earnestly believe that they are created by God and hence are ultimately owned by Him, they would flatly deny being owned by their fellow "created" beings. As a matter of fact, Locke's "God-Ownership-Self-Ownership" thesis has been used by many Christians and theologians as a convincing argument against slavery: although God ultimately owns us, we stand in a relationship of equality to other beings; consequently, no human being is justified in owning (enslaving) another fellow human being.

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[1] Of course, I do not mean to imply that consent plays an insignificant role in Locke's political theory. I am well aware of the fact that he regards consent (both tacit and express) as the ultimate criterion of legitimate governments. That said, he also amply demonstrates the limits of individual's right to consent. For example, Locke rejects the libertarian claim that anything can be done to a self-owner with consent. I shall argue shortly that given Locke's rejection of this claim, Libertarians cannot summon the spirit of Locke to defend their doctrine of self-ownership.

[2] If we replace God with the state in Kant, then Kant's argument comes very close to Locke's claim that we are sovereigns over our properties and also proprietor of God. Kant holds that our property rights are

While, as I have tried to show, it makes good sense to talk about "self-ownership-cum- God-ownership", in my opinion, Locke's work cannot appropriately be regarded as the source of modern self-ownership-based political thought. Since, for Locke, one cannot determine what shall be done with one's life — because God constrains what one may do to oneself — we cannot attribute to him the libertarian self-ownership which underlines a totalistic right to self-ownership. Indeed, it can be said that as property right in material things in Locke is limited by the natural law, so is self-ownership in him limited by "God-ownership." In Locke's view, the ultimate source of *all* our entitlements, including our bodily rights, is God. As long as self-ownership in Locke is always contingent upon the will of God, libertarians' unbridled self-ownership cannot be said to originate with him. Accordingly, contrary to what many commentators maintain, Locke *cannot* be a philosophical precursor of "all-secular" self-ownership theorists[3]. A secular libertarian theorist might run an "error theory" here: The error is the proposition that God exists. So our imaginary secularist strips that away and arrives at a "Lockean" position on self-ownership. However, this line of reasoning seems vague, if not vacuous, in the sense that a "theist" supporter of Locke might equally run an "error theory" as a comeback: the error is the proposition that God does *not* exist. Thus, he strips that away to "stop" the secularist from arriving at a "Lockean" position on self-ownership!

Libertarians might say that even if the doctrine of self-ownership did not originate with Locke, the doctrine still plays an indispensable role in political philosophy. Indeed, as we shall see shortly, some libertarians, including Nozick, have argued that anyone

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inviolable vis-à-vis our co-equals but not vis-à-vis a legitimate state. Our fellow citizens have no right to intervene with our property rights but the state can sometimes justifiably violate our property rights.

[3] In saying this, I am far from saying that Locke couches his entire political theory on theological terms. While his account of inalienability of right to life cannot be justified independently of his theological leanings, I think there are other important aspects of his theory which are not purely theological in form. For example, his labour mixing argument can be justified on secular terms. I.e., rationality demands that people be rewarded for expending their labour. Arguably, a rejection of Locke's theology does not necessarily rob his entire theory of its plausibility.

committed to the inherent moral status of persons is committed to endorsing the doctrine of self-ownership. Nozick, in particular, sees the doctrine of self-ownership as a core component of treating persons as ends in themselves. The next section will be devoted to discussing the implicative relationship, if any, between self-ownership and Kantianism about the person. In opposition to Nozick, I will contend that treating people as ends in themselves does not require endorsing the libertarian self-ownership.

Self-Ownership and Kantianism about the Person

Self-ownership is considered by some libertarians to be the only plausible interpretation of Kant's second version of the categorical imperative; to wit, never treat persons as mere means but also always as ends (in Chapter three, I referred to this as the "means-ends" principle, for short. I will continue to do so in this chapter). Most libertarians insist that treating people as ends in themselves requires respecting their self-ownership. Nozick, for instance, makes it clear that Kant's maxim to treat people always as ends in themselves yields self-ownership. As we saw in the previous chapter, Nozick insists that our "separateness of persons" consists in our having different and distinct bodies. Consequently, Nozick would predictably say that forcing a person to help another person unavoidably violates that person's self-ownership, and violating a person's self-ownership is tantamount to treating that person as a means to an end.

Indeed, Nozick's "separateness of persons" argument suggests that it is by recognizing that individuals own themselves, and not interfering with the decisions that they make, that we truly and fully treat individuals as ends in themselves. In short, on Nozick's view, not to treat persons as ends in themselves is to violate their self-ownership. The opposite point also holds good: to violate a person's self-ownership is to treat that person not as an end. ~~That said,~~ from the libertarian viewpoint, failing to help the poor is consistent with the principle of self-ownership: my failure to help the poor does not entail that I interfere with the right of the poor to use him/herself as s/he wishes. For instance, my failure to help Mr. Broke does not mean that he (Mr. Broke) lacks the right to decide what is to happen to his body: What Mr. Broke does with or to his body is his business; he can do whatever he likes, provided he respects the right of others, including others' right to refuse to help him. In sum, most libertarians would have us believe that Kant's means-ends principle — a principle which they also align with the principle of self-ownership — is consistent with the libertarian negative rights. Since Nozick holds the doctrine of self-ownership and Kant's means-ends principle in tandem, his argument suggests that anyone committed to Kant's principle has no choice but to adopt the doctrine of self-ownership. In Chapter three, I raised a question regarding the status of the libertarian absolute negative rights within the Kantian framework, contending that the spirit of Kant's injunction militates against the libertarian 'absolutist' interpretation. Without attempting to revisit my argument there, I will only argue here that, contrary to the view of Nozick, there is no intrinsic connection between self-ownership and Kant's means-ends principle.

It is ironical that Nozick tries to associate the principle of self-ownership with the authority of Kant, given that Kant himself overtly and vehemently dismisses the very concept of self-ownership as incoherent and self-contradictory. Kant puts it this way: "Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory… a person cannot be a property and so cannot be a thing which can be owned for it is impossible to be a person and a thing, the proprietor and the property" (Kant, *Lectures on Ethics*, 165). The principle of self-ownership, from Kant's viewpoint, implies that there is something called "self" which owns itself. However, since man is a person, as opposed to a thing, man cannot be a thing to be owned. In support of Kant, one might say that the very concept of self-ownership is unintelligible, if not linguistically absurd. To be sure, in everyday discourse, if we say that X owns something, we unhesitatingly take it to mean that there is a person X who owns an object Y. The owner is obviously considered to be distinct from the object. We seem to conceive of property as things that are owned by persons, not by "selves." As John Sanders puts it, "My property is conceptually distinct from me. Ownership is a claimed relationship between me and something that is not me. The thesis that I own my body makes me out to be something independent of my body, and this is far too ghostly for my metaphysical tastes" (Sanders, 1987: 391).[4]

Anyway, the fact that Kant casts doubt on the intelligibility of the doctrine of self-ownership is sufficient to conclude that he never takes the means-ends principle to entail the principle of self-ownership. It should also be mentioned that since the principle of self-ownership says that a person has the right to decide what is to happen to his/her body, Kant cannot consistently endorse the principle. Indeed, Kant categorically rejects the libertarian idea that self-ownership licenses a person's using his/her body in whatever non-harmful way he/she chooses. As we saw in Chapter three, Kant, contrary to self-ownership theorists, argued against suicide, prostitution, self-mutilation, selling of body organs and voluntary enslavement. Kant's argument clearly implies that forcing a person not to commit suicide, say, is compatible with treating that person as an end. This gives further credence to my claim that Kant does not see the principle of self-ownership and the means-ends principle as philosophical 'bedfellows.'[5]

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[4] Similarly, J.P. Day has contended that since ownership is purely irreflexive relations (i.e., ownership does not refer to the same entity), it is unintelligible to talk about self-ownership. He writes: "...it makes no sense to speak of A owning himself. The reason is quite general, that *owns* or *possesses* and its converse *appertains* to are irreflexive relations...E.g., *Fido owns Fido, this dog owns this dog, this person appertains to this person and I am mine* are all meaningless" (1966: 216).

It might be replied that the fact that Kant himself severs the means-ends principle from the doctrine of self-ownership does not necessarily mean that libertarians are wrong in invoking the principle to justify the doctrine of self-ownership: for there may be other plausible libertarian interpretations of Kant's means-ends principle that are harmonious with the doctrine of self-ownership. The problem with this line of reasoning is that, it rather shifts the burden of proof on the libertarians: libertarians must show that their 'absolutist' interpretation of Kant's principle is the *only* plausible interpretation. In the absence of further argument, there is no reason to privilege the libertarian interpretation over the non-libertarian interpretation of Kant's doctrine about means and ends. Given that Kant himself denies any intrinsic relation between his means-ends principle and the libertarian self-ownership, it is not unreasonable to say that the burden of proof should lie with the proponents of the doctrine of self-ownership. In short, the mere fact that Kant could consistently defend the means-ends principle and reject the principle of self-ownership seems to give the lie to the libertarian *general* claim that a commitment to the former implies adoption of the latter. Indeed, I will argue (with Kant) that it is more plausible to say that rejecting the libertarian unmitigated self-ownership does not commit one to rejecting the means-ends principle.[6]

In my opinion, whether or not Kant's means-ends principle entails the libertarian self-ownership thesis depends crucially on how one interprets the notion of treating a person as an end. If not treating someone merely as a means in the sense of not *directly* harming that person is tantamount to treating that person as an end, then clearly Kant's means-ends principle will correspond to the libertarian self-ownership. However, in my estimation, refraining from harming a person should be regarded only as a necessary— but not sufficient— condition for treating a person as an end. In other words, not treating someone merely as a means does not suffice for treating that person as an end. My interpretation implies that a billionaire who refrains from hitting a starving child to death does not treat the child as a means, s/he nevertheless does *not* treat the child as an end, either. As I pointed out in Chapter three, to treat a person as an end requires positive efforts to help out and not just forbearance of harm. As G.A. Cohen points out, to treat a person as an end entails an attitude of concern towards, a lack of indifference to, that person (Cohen 1995: 239). The contrast Cohen draws between one's attitude to a ticket seller and to a ticket machine might be useful here in developing my argument: While I treat both the ticket seller and the ticket machine as a means to my purposes, the difference between the two is palpably manifested when things go wrong: "if the machine breaks down, I just get cross: now I cannot get the ticket. But if the man breaks down, if he is suddenly seized with a fit, I do something about it, I try to help, and I thereby show that I never regarded him as a means only" (Ibid. 239). Cohen's example buttresses my thesis that not to regard a person as a means only is not equivalent to treating a person as an end. Treating the man who breaks down as an end, I think, is compatible with forcing others to aid him. We cannot plausibly say that we respect his humanity when we do not force others who can, but are to do so voluntarily, to help the man out.[7] Respecting people or as Kant puts it, treating people as ends means respecting them as agents, as co-inhabitants of a shared world, not just as owners of their own bodies. Thus, it is not absurd to say that treating the poor dying of starvation is consistent with forcing the rich to comply with their moral obligations to assist the needy. After all, the poor are our co-inhabitants of a shared world, Kant would remind us.

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[5] Also, the fact that Kant explicitly supported redistributive taxation for the sake of providing for the poor evidently suggests that he does not share the libertarian view that forcing a person to help the poor amounts to treating that person not as an end. For more on Kant's argument in favor of redistributive taxation, see Chapter 3.

[6] In Chapter three, in opposition to libertarians, I argued at length that it is possible and, indeed, plausible to defend rights consistent with Kant's means-end principle, yet not take these rights to be the libertarian negative (absolute) rights.

Predictably, Nozick and libertarians would retort that since the rich own themselves, forcing them to help the poor would inescapably violate their self-ownership. However, even if we grant, for the sake of argument, that we violate the self-ownership of the rich by forcing them to help the needy, it does not remotely follow that the rich are being treated as a means but not as an end.[8] To say that we treat the rich as a means, and thus not as ends by forcing them to help the poor via redistributive taxation is to misconstrue

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[7] Our legal system seems to support my contention that respect for others requires positive effort to aid others. To be sure, in most countries, including Canada, a person can be criminally charged and fined for failing to help anyone hurt in a car accident. It is not only uncharitable to ignore those hurt in an accident, it is also illegal not to do so!

[8] That said, I will argue later in this chapter that one could consistently maintain a commitment to both the principle of self-ownership and a policy of redistributive taxation.

Kant's means-ends principle. It is crucially important to point out that Kant's principle does not state that persons are never to be used as means, but that they are never to be used *only* as means, as *mere* means or as means *simpliciter*. Put differently, Kant's principle permits us to use others as means, as long as we at the same time honor their status as an independent center of value, as an originator of projects that demand our respect (Cohen 1995: 239). In other words, using someone is all right *if and only if* we treat the person we use as (also) an end.

The second formulation (the means-ends principle), as exemplifying the category of plurality, leads to the third formulation as exemplifying the category of totality, which is contrary to the principle of self-ownership espoused by libertarians. In Kant, the concept of a person as an end is later embedded in the concept of the realm of ends, as a totality of a system of ends. Given that taxation is used to maintain a system that insures that all have access to the basic means of subsistence, *including oneself of course*, no person is being treated *simply* as a means. If my interpretation of Kant's means-ends principle is sound, then one might say that the libertarian deployment of the formulation of persons as ends is a case of grafting a Kantian concept onto non-Kantian conception of 'individualistic' self-ownership. Kant's view about persons implies that private property claims are not absolute, nor should one expect them to be, given that property involves things with a *price*, as opposed to persons with a *dignity*.[9] According to Kant, persons, unlike private property, possess an inviolable dignity as a result of their status as moral agents. The distinction Kant draws between price and dignity, coupled with his claim that persons are members of the realm of ends or co-legislators seems to suggest that we undermine individuals' respect or dignity by failing to assist them materially.

Libertarians cannot plausibly say that in asking the rich to help the poor governments are unconcerned about their bodies and their lives, and thereby are not treating them as ends. To be sure, governments believe that they should help the poor precisely because they also believe that assisting them will not seriously impair their lives or self-determination. Simply put, taxing the rich will still leave them a fair share of resources and liberties with which to control the essential features of their lives (c/f Kymlicka 2002: 124-125). We treat the rich as ends by taxing them provided it does not blight their ability to act according to their conception of themselves. In sum, libertarians' claim that taxation—which they regard as an assault on self-ownership—involves using a person (as opposed to the money the person acquires) as a means rather than as an end requires an extremely stretched interpretation of Kant's principle. If the argument advanced in this section is cogent, then we can conclude that rejection of the libertarian unlimited self-ownership does not necessarily imply repudiation of Kant's means-ends principle. Put differently, contrary to what libertarians think, Kant's means-ends principle does not really support the principle of self-ownership. Regardless, libertarians (and, indeed, some non-libertarians) regard the doctrine of self-ownership to be inherently attractive. Thus, the next section is devoted to exploring the intuitive basis on which the principle of self-ownership rests. After having done that, I will proceed to defend the main thesis of this chapter: one can be committed to the doctrine of self-ownership without being a *fortiori* committed to rejecting redistribution through taxation and welfare programs.

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[9] Kant famously draws a distinction between market price and human dignity: "In the realm of ends everything has either a price or a dignity. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has a dignity" *Foundations of the Metaphysics of Morals*, Trans. Lewis W. Beck, (1980: 53).

The *Seeming* Lures of the Doctrine of Self-Ownership

The right to liberty, which is the hub of libertarianism, is said to be a consequence or function of our right to self-ownership. Indeed, self-ownership is said to merge so well with liberty that it has been contended that "if one wishes to attack it one has to do so on grounds other than liberty" (Van Parijs 1995: 9). Since the doctrine of self-ownership merely attributes to persons control over themselves, a denial of the doctrine appears to commit one to holding the view that people are owned by other people: if we do not own ourselves, then somebody *else* does.[10] Thus, a rejection of self-ownership seems to be an implicit endorsement to (partial) slavery. In other words, from libertarians' perspective, one can reject self-ownership only at the cost of accepting or justifying slavery. A blunt exposition of this view is made by Narveson who believes libertarians will formulate their powerful objection to involuntary slavery "by insisting that people, any and all of them, are the fundamental owners of their own bodies, and of no one else's" (1988: 68). Edward Feser, another staunch libertarian, has recently corroborated Narveson's argument by contending that unless one accepts the thesis of self-ownership, one has no way of explaining why slavery is evil. After all, it cannot be merely because slaveholders often treat their slaves badly, since a kind-hearted slaveholder would still be a slaveholder, and thus morally blameworthy, for that. The reason slavery is immoral must be because it involves a kind of stealing – the stealing of a person from himself (2004: 33). In a nutshell, libertarians, despite their differences, are unanimous in holding that the principle of self-ownership is a necessary condition for not being anyone's slave.

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[10] Of course, I do not concur with libertarians that a denial of the doctrine of self-ownership commits one to saying that people are owned by other people. Indeed, I rejected this sort of inference in Chapter four when I discussed our relationship to unowned resources. Also, Christians who agree with Locke that they are owned by God can consistently deny being owned by their fellow human beings!

The principle of self-ownership, so interpreted, appears to enjoy a tremendous prima facie plausibility. To be sure, some libertarians have gone so far as to suggest that the principle carries considerable intuitive appeal so much so that we do not need any philosophical justification in order to accept it (Feser 2004). It is interesting to point out that the seemingly inherent attractiveness of the principle of self-ownership has compelled *even* some radical egalitarians and socialists to accommodate the principle within their political theory. I have in mind G.A. Cohen who, though a staunch Marxist socialist, has taken pains to reconcile the doctrine of self-ownership with radical egalitarianism. Cohen, one of the sternest critics of Nozick, has overtly acknowledged that even opponents of Nozick's political theory would have a hard time refuting the principle of self-ownership upon which his libertarianism rests. He confesses: "it is a strength in Nozick's position that the thesis of self-ownership is inherently appealing" (1995: 101). Elsewhere, he is more forthcoming: "Nozick's political philosophy gains much of its polemical power from the attractive thought that… each person is the morally rightful owner of himself" (1986: 109). Cohen argues against libertarianism *not* on the grounds of the principle of self-ownership — he concedes that it is futile to attempt to argue against the principle — but on the grounds that the principle does not justify libertarianism or 'capitalist inequality', as he prefers to call it. In short, the intuitive plausibility of the doctrine of self-ownership seems to force Cohen not to contend against the doctrine *per se*, but to argue against the orthodox claim that respect for self-ownership entails libertarianism.[11]

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[11] Against Nozick, Cohen maintains that self-ownership need not have inegalitarian implications. According to him, the thesis of self-ownership is so tenable that even socialists and Marxists should endorse it. Whereas libertarians invoke self-ownership to justify capitalism and inequality, Cohen contends that the same thesis can be employed to justify socialism and Marxism. To bolster his claim, he contends that the Marxist condemnation of exploitation implies an endorsement of self-ownership. Particularly, Marxists' claim that capitalists steal labour time from the propertyless wage workers is only plausible if what is stolen genuinely belongs to the proletarians. And if what is rightfully theirs is stolen from them, then it implies that their self-ownership is being violated. Cohen believes Marxist socialists could formulate their powerful objection to capitalism by insisting that the worker is the proper owner of his own labour time: he alone has the right to decide what will be done with it since he is the rightful owner of his own powers. In short, capitalists inevitably violate the self-ownership of the working people by stealing from them their (legitimate) labour time (Cohen 1995: 146-147). However, it should be mentioned that the kind of self-ownership Cohen is associating with Marxism is entirely at odds with Nozick's construal of the thesis of self-ownership. For Nozick, one's ownership is violated if and only if one is coerced into doing something. On Nozick's account, if you are faced with the choice of working for some capitalist or starving, and you choose to work, your decision is devoid of coercion. Since you voluntarily choose to

The thesis of self-ownership becomes much more intuitively attractive when it comes to bodily integrity. We seem to recognize a general right to bodily integrity because recognizing it is consistent with our right to our own bodies. Almost everybody is averse to the idea that people's bodies be intrusively invaded against their wish even if doing so will save many lives.[12] Imagine you are asked to transplant one of your healthy kidneys into someone who is on the verge of death owing to kidney breakdown. If your failure to donate one of your kidneys attracts coercion or punishment by the state or the power that be, we will all unhesitatingly condemn the coercer on the grounds that the kidneys are your rightful property and hence it is up to you to keep it or give it away.[13] In sum, self-ownership seems to confer rights against involuntary bodily intrusions, and against coerced deployments of individuals' bodies. Nozick makes similar strong cases for inviolability of our bodies: "You've been sighted for all these years; now one--- or even both- of your eyes is to be transplanted to others, or killing some people early to use their bodies in order to provide material necessary to save the lives of those who otherwise would die young" (ASU: 206). These claims against "forceable redistribution of bodily parts" seem so irrefutable that even the 'hardcore' egalitarian would go along with Nozick. As Cohen, a mainstream egalitarian, once again acknowledges: it is an intelligible presumption that I alone am entitled to decide about the use of this arm, and to benefit from its use, simply because it is my arm" (1995: 70-71). Thus, it is not unreasonable to conclude that the appeal of bodily inviolability holds for all human beings, regardless of our ideology. [14]

Nozick, like other libertarians, insists on describing the rights we have with respect to ourselves as property rights.[15] That is, he understands self-ownership as rights over one's

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'sell' your labour, your labour is not "stolen" from you, and thus your self-ownership is respected. In short, what "Cohen-Marxist" considers to be a palpable breach on the ownership of the proletarians would be innocuous as far as Nozick is concerned. For Nozick, since the proletarians are not forced into working for the capitalists, their self-ownership cannot be said to be violated.

[12] However, it should be pointed out that the right to bodily integrity that we recognize is also qualified in many ways. For example, it is not necessarily a right-violation to strike an assailant, or to jostle through a crowd to catch a thief, or to pull a comatose victim to safety.

[13] The example is the property of Andrew Levine (Levine, 1988: 44).

[14] One might say that I am conceding to the libertarian too much. But I am not: I am only explaining why some commentators think the doctrine of self-ownership is irrefutable. Indeed, I will soon argue that the doctrine is less intuitively plausible than some libertarians and commentators seem to realize.

[15] Indeed, some libertarians reduce all rights to self-ownership. Nozick's (and Locke's) comprehensive notion of property implies that none of us lacks property since we all have property in "our own persons". Libertarians who identify property merely with the objects of rights to exclusive use will insist that the human body is property. However, it sounds strange to say that one's arm is one's property. Ordinary language is often strained by the identification of property with one's body. The use of the term property is all too often limited to (external) material things. Individuals who own nothing but themselves would consider themselves propertyless. As Proudhom scoffingly puts it "To tell a poor man that he has property

person. In Nozick, self-ownership is absolutely fundamental, and it is starkly reduced to the rights we have over ourselves. As he puts it: "People do not conceive of ownership as having a thing, but as possessing rights" (ASU: 281). In short, on libertarians' view, our rights are nothing more than things we own. In fact, for Nozick, all the Lockean rights (life, liberty, health and possessions) are rights we possess, and to possess or own something is simply to have a certain bundle of rights as regards that thing.[16] Because a right is something I own, it gives me full access to that thing: if I own my body, then I have every liberty to control what is to be done to/with it. Since I am the sovereign over myself, I have the liberty to use even drugs which are detrimental to my health. The state unjustifiably curtails my liberty and thereby violates my self-ownership by forbidding me to use jeopardous drugs like cocaine, marijuana and heroin.[17] In the words of Nozick: "someone may choose (or permit another) to do to himself *anything*" (ASU: 58, italics in original). Since self-ownership furnishes me with the absolute command over myself and the things that I own, it also furnishes me with protection against other persons and the state provided I do not engage in activities detrimental to others' self-ownership: "I may fill my lungs with pot smoke; you may, if you like, use my body in any way I allow you to and so on" (Alan Ryan 1992: 157). In short, libertarians believe any voluntary action which respects the ownership of other people is perfectly compatible with the thesis of self-ownership.[18]

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because he has arms and legs...is to play upon words, and to add insult into injury" Proudhon, *What is Property?* (1966: 61).

[16] Nozick believes that property right may be conceived as a bundle of rights, i.e., many people can possess different rights in one object. "One person can possess one right about a thing, another person another right about the same thing" (ASU: 282).

[17] There is currently a stringent federal law in the United States which prohibits the manufacture and importation of heroin. The sole import of the law is that those who get addicted to the drug run the risk of destroying their health. Violators of the law are made to face the full rigor of the law. Nozick would regard such a law as sheer paternalism. Presumably, he would say that such a law violates citizens' right to deliberately and consciously terminate their lives. This is not to imply that Nozick would encourage people to take deleterious drugs to ruin their lives. Rather, he would say that if I decided to indulge myself in harmful drugs, the state should "leave me alone". After all, the minimal state is there to protect me from others—not from myself.

[18] It should be noted that libertarians' self-ownership is not equivalent to a Hobbesian liberty where one can do whatever one can get away with it. To be sure, self-ownership is limited by the negative right of other people. That is, our self-ownership should have benign effects on others' self-ownership. My self-ownership should co-exist with the self-ownership of everyone else. Just as my property in my knife does not allow me to put it in your back, (ASU: 172) so my self-ownership does not allow me to be aggressive against other people. If you want to use your self-ownership in a manner that harms me, the state is justified in preventing you from doing so, since you do not have any right to use your self-ownership to harm me in the first place. Your liberty or self-ownership is curtailed or violated if and only if you are prevented from doing what you have a right to do. Thus, Nozick's conception of liberty is entirely different from Hobbes', who defines liberty in terms of what one *wants* to do, not in terms of what one has the *right* to do. For Hobbes, liberty consists in the absence of external impediments to motion. Thus, Hobbes, unlike Nozick,

The doctrine of self-ownership, as we have seen, seems to carry considerable conviction. Indeed, the doctrine is very predominant in our ordinary life and speech so much so that it is common in both academic and non-academic circles to invoke it at both the slightest and most provocation. For example: if the state wants my left lung for transplant, and it intends to coerce me into giving it away, I would protest by saying "it is my *lung*; others cannot just take it without my consent." In protesting thus, I do not merely say that it is against the law to forcibly remove my left lung, but I claim something stronger; namely, that *morally* speaking I *own* it — regardless of whether the law protects my bodily organs or not. And likewise in many other aspects: "it is *my* life, "it is *my* health"; "it is *my* liberty"; no one would back those utterances by invoking, simply, "because the law says so". Indeed, when you proclaim that adults should be at liberty to consent to, and contract into, living as they please, you are implicitly endorsing the doctrine of self-ownership.

However, while you might agree with libertarians at this superficial level; namely, that individuals (adults) should consent to living as they please, you will not be so sure, perhaps, if faced with particular theoretical examples that follow deductively or by implication, not to mention real-life examples. Consider this example: not being a sadist yourself, you will not appreciate the sound of the screams of your neighbor's consenting slave as he mercilessly beats him every evening while you are sitting down to enjoy your supper. Possessing the knowledge of what is taking place next door might *in itself* be a tremendous challenge to your first, intuitive response that individual adults (yourself included) should be at liberty to consent to living as they please: your knowledge of what is happening next door might produce very strong feelings of disgust, anger and despair in you. Yet you think that this state of affairs is not sufficient ground for you (i.e., an outsider) to have a *right* to interfere. Unsurprisingly, Nozick thinks the same: "it would be objectionable to intervene to reduce someone's situation in order to lessen the envy and unhappiness others feel in knowing of this situation. Such a policy is comparable to one that forbids some act (for example, racially mixed couples walking holding hands) because the mere knowledge that it is being done makes others unhappy" (ASU: 245).[19]

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would see *even* legitimate laws designed to stop people from encroaching upon others' self-ownership as an obstacle to liberty.

[19] I realize that later Nozick might intervene on the basis of the reality of the others' suffering. He might 'okay' such an intervention as long as it is an individual who is doing it, with minimum mutilation, of course. Indeed, arguably, he might intervene on the basis of nuisance. That said, I am not sure how exactly this argument from 'nuisance' will work within the Ethic of Respect. Anyway, the bottom line is that since

Notwithstanding your liberal line of thinking, you might have your doubts whether your liberal attitude should be *that* liberal. Indeed, you might now begin to be skeptical about the libertarian claim that self-ownership or consent legitimates all action. A dramatic story about a consenting slave being mistreated, a story tailor-made to illustrate a possible consequence of Nozick's understanding of rights as something we own— and therefore may sell or exchange in return for certain services — is the following:

> Medical expertise, not being a natural resource, does not fall under Nozick's "Lockean proviso" (cf. ASU 181, the cases of the medical researcher and the surgeon). The following trialogue is then a realistic scenario within Nozick's libertarian society. A police officer comes upon a couple struggling with each other, the man evidently trying to rape the woman.
>
> **Woman**: Please, sir, please help me.
> **Officer** (to man): Hey, you, let her go at once!
> **Man**: Don't get involved.
> **Officer**: I must. You're violating the woman's right not to be assaulted.
> **Man**: No, I'm not. She is my slave. Here are the papers, signed by herself.
> **Woman**: But I was coerced into signing. He said he would not treat my father if I refused to sign.
> **Officer**: That's not coercion but at most duress. He was at liberty not to treat your father or to ask compensation for treating him.
> **Woman**: But my father is dead!
> **Man**: The contract says only that I would try to save him, and I did.
> **Officer** (*to woman)*: I'm sorry, ma'am, but I cannot help you.
> **Man**: But you can help *me* in forcing her to fulfill her contractual obligations. She has already scratched me. See if you can tie her hands.
> (*Officer ties woman's hands, she screams for help as she is being raped….*)
> My sons will have lots of fun with her when I bring her home (Pogge 1989: 49-50 fn. 51).[20]

While this might not be a "realistic" scenario, at least it is a possible scenario. Anyway, whether or not this example is far-fetched is beside the point. What is important is the principal point that the scenario does not, as far as the woman is concerned, involve rights violations given the fusion of Nozick's conception of self-ownership. As far as the slaveholder and the officer are concerned, the woman rather violates his right not to be scratched — she does not respect his right to noninterference with his health, Nozick might add. Indeed, the police officer, seen through the glasses of Nozick's theory, protects the slaveholder's right by helping him (the slaveholder) to rape the helpless woman!

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the four-level moral structure is conspicuously absent in ASU, it is fair to say that Nozick of ASU would reject such an intervention.

[20] A remark about the use of the word "rape" in this example: As the woman has voluntarily signed a contract legitimising "border crossings" – that is, presuming that she has not been coerced into signing – it is not clear that what is happening here must be identified as rape. One way to put this point is to ask how is it possible to actually rape a person who has, by selling herself into complete slavery, in advance consented to being "available" to her master in all ways; wouldn't it be more accurate to say that she has given her master a *carte blanche* to have sexual intercourse with her? If so, then it will not be possible for him to *rape* her, since it is not against her (contractual) will that he has sex with her every time *he* (and therefore possibly not she) want to.

Without a doubt, most of us will be uncomfortable with this story. That we will be uncomfortable seems to suggest that there is a stronger intuition pulling us in the opposite direction of the first, spontaneous intuition that individuals may use or dispose of themselves or consent to others using or disposing themselves. The point of the otherwise drastic, if not bizarre, example is to cast doubt on the initial plausibility of the doctrine of self-ownership. The example clearly shows that the appeal to intuitions cannot exclusively validate the libertarians' principle of self-ownership. Indeed, we may resort to intuitions to reject the apparently radical ramifications of the doctrine of self-ownership. Coming back to the "rape" example, our intuitions tell us that the police officer is completely justified in using force to "free' the woman *even if* she has "consented" to be raped. In fact, given the woman's reluctance to succumb, one might say that she didn't really know what she was contracting into and thus government or the power be, can, with justification, revoke the contract. Our intuition seems to go against the libertarian claim that contracts signed between consenting adults cannot be revoked, no matter how depraved it is. Thus, we are inclined to concur with Joel Feinberg that "if a policeman (or anyone else) sees John Doe about to chop off his hand with an ax, he is perfectly justified in using force to prevent him", and afterwards "it will be up to Doe to prove before the official tribunal that he is calm, competent, and free, and still wishes to chop off his hand" (1973: 49-50).[21] Feinberg's example seems to lend credence to my contention that self-ownership cannot legitimize all actions. In my opinion, there are certain things that are so "intrinsically" and "intuitively" evil that no "amount" of self-ownership can justify them. For example, most of us intuitively believe, with Kant, that voluntary slavery is debasing because it is tantamount to abdication of freedom or humanity.[22] It sounds intuitively implausible and extremely bizarre to say that individuals can consent to be tortured, enslaved and even killed.

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[21] Presumably, libertarians would say that besides advocating the violation of Doe's liberty, this position also discriminates against irrational people: it coerces such people into taking "the rational attitude" towards life instead of the one they already live by. They might add that a reason why questions concerning the soundness of individual judgments cannot play an important role is that a nonvoluntary "investigation" into whether a person is rational would in itself constitute an intrusion into that person's sphere of rights: it would amount to using force directed against his (personal) liberty and so would violate his right to non-interference with his liberty. However, in our example, it is clear that no one (apart from Nozick and his fellow libertarians) would say that the police officer unjustifiably intrudes by helping to exonerate the woman.)

[22] J.S Mill has condemned slavery being voluntary or mandatory on the grounds that it is an abdication of individual liberty, which, from his standpoint, constitutes diminution of the social goal or good. Similarly, Kant has convincingly argued that a person cannot go into a contract renouncing his freedom. Kant believes that a person who sells himself/herself into slavery loses his/her freedom as well as his humanity. According to him, only the capacity for moral choice makes us human beings or as, he famous calls, it

While libertarians are right that the doctrine of self-ownership is intuitively plausible because it rules out voluntary slavery, in my estimation, it is counterintuitive because it justifies even the *so-called voluntary slavery*.[23] By condemning *only* involuntary enslavement, libertarians woefully fail to tell the whole "story" about our intuitions regarding slavery: Slavery being voluntary or mandatory is morally offensive and intuitively unacceptable. Similarly, while the doctrine is attractive because it forbids bodily intrusion, it runs afoul of our intuition that individuals can sell their body for parts or can engage in sexual interaction.[24] In short, a commitment to a right against involuntary slavery and forced body-organ redistribution carries with it no commitment to a right to voluntary enslavement or to donation and trading with body parts. Yes, we agree with Libertarians that the enslavement and confiscation of body organs are morally wrong, but the libertarians forget that it is precisely because they are wrong, our intuitions would respond poorly to their radical assertion that individuals can voluntarily enter into slavery and/or transfer body parts. A theory, in my opinion, cannot be counterintuitive and plausible at the same time. I will defend this apparently "intuitionistic" argument by appealing to the method of "Wide Reflective Equilibrium."

The Method of Wide Reflective Equilibrium (WRE)

The method of WRE was first used by Nelson Goodman (1965), who invoked it to justify deductive and inductive principles. However, John Rawls (1971, 2001) is generally accorded the honor of being the first philosopher to invoke the method of reflective equilibrium to justify the principles of justice. The key idea underlying this view of justification is that we "test" various parts of our system of moral beliefs against the other beliefs we hold dear, looking for ways in which some of these beliefs support others, seeking coherence among the widest set of moral beliefs, and revising and

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"ends in themselves". The innate right to freedom, he writes: "is the only original right belonging to every man by virtue of his humanity" Kant, *The Metaphysics of Morals* 63. Thus, Kant would unhesitatingly reject the libertarian claim that a person can voluntarily enter into slavery. Given Kant's famous vehement rejection of voluntary enslavement, suicide, prostitution and selling of body organs, it is ironic that libertarians (e.g., see ASU: 31) invoke the authority of Kant to defend their doctrine of self-ownership.

[23] I think libertarians are wrong to hold that an individual could voluntarily enter into slavery because if he did so voluntarily, his condition would not be slavery! In other words, there is no such thing as voluntary slavery!

[24] A market transaction with property, according to libertarians, is morally the same as the sexual interaction with bodies, and any denial of the rights to enter into either is an unjustifiable restriction of the individual's moral space. Laws that block property transfers are something like sexual anti-miscegenation laws. In short, bodily rights and property rights seem to have an identical molecular structure of component rights. Both sets of rights give, libertarians might say, rights of discretionary exclusion and use. I will question the appropriateness of the analogy between the right to engage in sexual interaction and the right to transfer property.

refining them at all levels when challenges to some arise from others. Following Rawls (1971), I will briefly contend that consistency is an important requirement of justice; therefore, our beliefs about justice are justified *if and only if* they can be made to cohere with our other firmly held moral beliefs or moral intuitions.

The method of reflective equilibrium may be narrow or wide. A narrow reflective equilibrium (NRE) consists in working back and forth between a judgment we are inclined to make about right action in a particular instance and the reasons or principles we offer for that judgment. In short, NRE focuses exclusively on particular cases and principles that apply to them. Contrarily, wide reflective equilibrium (WRE) is attained by proceeding to consider alternatives to the moral beliefs, along with philosophical arguments or backgrounds that might decide among these beliefs. In other words, the WRE requires us to broaden the circle of moral beliefs and to test them against developed or leading alternative moral theories. At the risk of oversimplification, we may summarize the difference between the two as follows: while the method of NRE seeks coherence *only* between moral judgments and moral principles, WRE takes background theories into account.

While in *A Theory of Justice* (1971) Rawls does not explicitly use the terminologies of NRE and WRE, he alludes to the terminologies, explicitly contending that "it is the second kind of reflective equilibrium that one is concerned with in moral philosophy" (1971: 49).[25] Indeed, when he famously argues that justice as fairness, rather than utilitarianism, is consistent with our "considered judgments", he is obviously invoking the notion of WRE. Since the notion of NRE is not capable of testing our moral intuitions against competing moral and political theories, we can safely dismiss it as not directly relevant to the field of moral and political philosophy. As Norman Daniels, one of the avid proponents of WRE, has perceptively noted: "in ethics and political philosophy, we must answer that justificatory question, especially since there is often disagreement among people about what is right, disagreement that is not resolved simply by pursuing narrow reflective equilibrium."[26] I am with Rawls and Daniels that a fundamental aim of political philosophy should be able to evaluate competing theories, assessing their strengths and coherence. Accordingly, in what follows, unless otherwise indicated, the term reflective equilibrium should be construed in terms of WRE.[27]

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[25] In one of his later writings, Rawls expresses profound regret for not overtly using the terminologies of NRE and WRE. See his *Justice as Fairness: A Restatement* (2001: 31).

[26] http://plato.stanford.edu/entries/reflective-equilibrium

Armed with the understanding of the method of reflective equilibrium, let us now return to the crux of our argument: whether or not the implication of the doctrine of self-ownership fits with, and justifies our moral intuitions. The doctrine of self-ownership, as we saw, is initially intuitively attractive chiefly because it rules out slavery. Since the proposition that slavery is wrong matches with our moral intuitions, congruent with the method of WRE, we are justified in holding that proposition or belief.[28] Our belief against slavery is so fundamental to our ordinary moral understanding that no 'contemporary' morally serious person can doubt that enslaving a person is unjust. Given this, it appears libertarians cannot be faulted for subscribing to the doctrine of self-ownership, a doctrine that palpably rules out slavery. However, if the doctrine of self-ownership implies— as the libertarian fervently believes it does— that we can, with justification, voluntarily sell ourselves into slavery, then, the libertarian doctrine will violate our intuition, and thus lose the support of many. In other words, while libertarians are right that the doctrine of self-ownership is intuitively plausible because it rules out voluntary slavery, we can say that the doctrine is counterintuitive because it justifies even the *so-called voluntary slavery.* By condemning *only* involuntary enslavement, libertarians woefully fail to tell the whole "story" about our intuitions regarding slavery: Slavery being voluntary or mandatory can be said to be morally offensive and intuitively unacceptable. Similarly, while the doctrine is attractive because it forbids bodily intrusion, it seems to offend our intuition that individuals can sell their body for parts or can engage in sexual interaction. Yes, the method of WRE authorizes us to agree with libertarians that the enslavement and confiscation of body organs are morally wrong, but the libertarians forget that it is precisely because they are wrong, our intuitions would respond poorly to their radical assertion that individuals can voluntarily enter into slavery and/or transfer body parts. Thus, we must, to attain reflective equilibrium, reject (or at least substantially modify) the libertarian doctrine of self-ownership. As we have seen, according to the method of WRE, we should try to ensure that our *entire* system of moral thinking is consistent with the other intuitions that we have. As Rawls puts it, the justification of our beliefs "is a matter of the mutual support of many considerations, of everything fitting together into one coherent view" (1971: 21). I take Rawls to be affirming my thesis that a theory cannot be radically counterintuitive and plausible or defensible at the same time. It is not unreasonable to say that any plausible theory ought to be in harmony with our intuitions. Since the doctrine of self-ownership implies that voluntary slavery is justified, and since slavery in general, arguably, offends our intuition, despite the doctrine's initial attractiveness, we can dismiss it as counterintuitive.

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[27] It should be noted that I have used the method of WRE already in the previous chapters and sections to evaluate different political philosophies without explicitly using the terminology.

[28] That said, I acknowledge that WRE would have to take into account those historians of economies who have argued that capitalism has been justified in the past by economic circumstances that made it a much more economically efficient arrangement than the alternatives that were available at the time. Also, one might contend that Rawls's theory justifies slavery when it conforms to the difference principle ranging over all primary social goods --- if slavery benefits the slaves in the DP sense. However, it should be noted that the Difference Principle as lexically ordered in Rawls's preferred two-principle conception can't justify slavery. Thus, Rawls is absolutely opposed to those economist-historians who argue for slavery in past societies (ancient Greece, etc.) on grounds of economic efficiency. That said, that conception is derivative from a "general conception" which is the difference principle writ large, not constrained to non-liberty primary social goods. Should circumstances become really dire, Rawls allows retreat to the general conception (which can justify slavery if it's in the greatest interest of the slaves). He prefers to focus on the lexically ordered difference principle because that ordering is appropriate in almost all circumstances. He doesn't want the possibility of catastrophic circumstances to dominate theorizing about justice. I owe this to Wes Cooper.

It might be replied that our intuitions cannot serve as an impartial arbiter; therefore, my contention that slavery being voluntary or involuntary is intuitively unacceptable cannot constitute a knockdown argument against the doctrine of self-ownership. Indeed, some philosophers have dismissed the entire method of reflective equilibrium as unacceptable on the grounds that our intuitions are incapable of carrying credible weight in seeking justification. Such a line of criticism is often made by rule utilitarians. For example, some prominent utilitarians, including Richard Brandt (1979, 1990) have resorted to this line of criticism. Brandt has famously contended that "facts and logic" alone, and not moral intuitions, should play a role in moral theory construction and justification. In opposition to Rawls' method of WRE, Brandt insists that rational persons should choose moral principles when they are based on desires that have been subjected to maximal criticism by facts and logic alone. He calls this "cognitive psychotherapy" (Brandt 1979: 113). On this view, since our moral 'intuitions' or beliefs may result from culturally 'irrational' indoctrination or bias, we are not justified in factoring intuitions into political decisions. Indeed, Brandt has ridiculed Rawls' notion of WRE by contending that merely making "coherent" moral intuitions that lack "initial credibility" or "evidential" force" cannot produce justification.[29] Thus, he has concluded that the notion of 'intuitive' coherence in WRE is just a myth.

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[29] Of course, I don't mean to imply that Brandt is a cultural relativist. For a utilitarian is precisely not a cultural relativist. The difference between utilitarians and cultural relativists is as clear as day and night: The criterion of right is trans-cultural for the utilitarian, whereas it is culture-specific for the cultural

While there is an apparent truth in this line of criticism, the criticism in general, in my opinion, is a misguided one. Although I acknowledge that one cannot always ground one's argument in mere intuition alone, it cannot be gainsaid that intuitions play a crucial or useful role in political philosophy. Yes, our intuitions are not infallible, and yes they may be culturally shaped, *but* I believe there just is no *reasonable* alternative to evaluating competing theories. The criteria by which we judge a theory's plausibility should be its ability to cohere with our intuitions. While our intuitions might not be the panacea, they are the only wherewithal available for us 'mortal' beings to use to evaluate competing theories. In saying this, I am concurring with Will Kymlicka that political philosophy "is a matter of moral argument, and moral argument is a matter of appeal to our considered convictions" (2002: 6).

Let me hasten to add that by "intuitions", I do not mean 'raw' intuitions, that is, intuitions unsupported by reflection and reliable information.[30] To his credit, Rawls spells out the conditions under which we might solicit considered moral judgments, namely that people be calm and have adequate information about the certain moral issues. He rightly emphasizes that it is only through the critical scrutiny of moral judgments/intuitions that one can generate principles that are based on sound moral reasoning and not based on error or confusion (Rawls 1999: 40-46). Rawls' argument implies that there would be more agreement among people if their moral judgments were reached in a situation of full information, devoid of factual mistakes and cultural indoctrination. I will elaborate on this point later in this section. Suffice it to say here that while Rawls prefers not to consider the question of whether justice as fairness is applicable to other societies, it is

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relativist. That said, both dismiss Rawls' method of WRE as unacceptable. Also, as we shall see shortly, some communitarian political theorists, despite their apparent differences, have joined these utilitarians in contending that since our "intuitions" are culturally determined or shaped, any quest for a universal theory of justice is misguided. Michael Walzer, for instance, has argued that since there is no such thing as a perspective external to the community, it is impossible to step outside our history and culture. Accordingly, identifying principles of justice, according to Walzer, is more a matter of cultural interpretation than the method of WRE (Walzer 1983; Daniel Bell c/f 1993: 55-89).

[30] Some detractors of Rawls have insisted that Rawls' reliance on considered moral judgments or beliefs commits him to endorsing an ethical theory called intuitionism (See Hare: 1981: 75). However, I think it is a mistake to associate WRE with moral intuitionism. The former, unlike the latter, does not imply that a person is justified in believing whatever s/he happens to believe, as long as s/he has a strong enough "intuition". Classical ethical intuitionists, such as Samuel Clarke (1728) and G.E. Moore (1903), are foundationalists, who believe that our intuitions are impossible to be erroneous. In short, unmitigated intuitionists agree with Descartes that our basic beliefs are self-warranted, absolutely certain, and incorrigible in the sense that they are wholly immune from error and refutation. WRE, on the other hand, maintains that moral judgments are revisable, (c/f Daniels 1979: 264-6) and thus are not foundational. In sum, the 'intuitions' embedded in the WRE do not have the status of incorrigibility or infallibility. Rather, our intuitions are justified in virtue of their relations to other moral beliefs we hold. Thus, one might say that proponents of WRE, including Rawls, take intuitionism as a starting point and apply the method of WRE to this initial data.

not absurd to say that despite our different cultural backgrounds, on reflection, we share some certain fundamental beliefs and intuitions, thus attaining equilibrium should not be an impossibility.[31] If the argument advanced so far is right, then it is reasonable to say that, the method of WRE, though imperfect, is the only method capable of being the ultimate test of a theory of justice across cultures.[32] For example, if upon thorough reflection "we share the intuition that slavery is unjust, then it is a powerful objection to a proposed theory of justice that it supports slavery. Conversely, if a theory of justice matches our considered intuitions… then we have a powerful argument in favor of that theory" (Kymilicka 2002: 6). To say that a theory of justice runs afoul of one's considered judgment or intuition, and yet proceed to support such a theory seems to commit one to irrationality, regardless of one's cultural affiliation.

Presumably, the cultural relativist would object that I have not located the real source of his concern. He might say that whether or not WRE is morally objectionable is not his primary concern. Rather, his principal concern is that the method of WRE requires what is impossible: since our moral intuitions and theories are inextricably shaped by our culture; we cannot transcend our social environment, and thereby secure one 'universal' equilibrium. In other words, the relativist might offer this conceptual argument against WRE: Even if the method of WRE is morally acceptable, the method requires what is unattainable; therefore, any notion of obtaining an equilibrium in moral justification is a chimera. Indeed, Richard Rorty (1989) and Daniel Bell (1993) have adduced this line of reasoning as an argument against moral universalism in general, and the method of reflective equilibrium in particular. Bell, for instance, writes: "all knowledge is context-bound—the critic cannot extricate herself from her context so as to be true to principles of rational justification independent of any context, even if she tries" (Bell 1993: 66).[33] In effect, since we can't "help" looking at issues from the point of view of our culture, our considered moral judgments will unavoidably be tainted by our culture. Thus, the communitarian or relativist believes that eventually there will be not only one equilibrium point shared by most people, but various different 'cultural' equilibrium points.

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[31] Rawls' position on this in the *Theory of Justice* is not very clear. He seems to think that it depends on the scope of 'we'. But certainly, in his *Political Liberalism,* he is clear that he is limiting his argument to post-Reformation, industrialized societies like those in Europe and America. While he is not quite a cultural relativist, his 'agnosticism' comes close (I owe this clarification to Wes Cooper). Given this, Rawls—especially the Rawls of *Political Liberalism*— would say that it is impossible to attain equilibrium. However, as we shall see shortly, I don't share Rawls' 'pessimism'.

[32] However, it should be mentioned that two distinct societies that instantiate different cultures may not always achieve "overlapping consensus".

[33] He proceeds, "once we recognize that our knowledge is context-bound, that there's no 'objective' standpoint from which to evaluate how we think, act, and judge, this should lead us to abandon this project that aims at finding independent rational justification for morality, an external and universal perspective that's to serve as a critical standard from which to evaluate the morality of actual communities. And if there's no trans-communities, this means that standards of justification emerge from and are part of a community's history and transition in which they are vindicated" (Ibid: 67).

This kind of reasoning is, however, unpersuasive as a critique of WRE. Indeed, the entire argument can be dismissed as a *non sequitur*: the fact that our intuitions or considered judgments are shaped and influenced by our social structures does not logically imply that we cannot arrive at some objective form of justification. A supporter of WRE can, with perfect consistency, agree with the relativist that our intuitions are shaped from our social perspective, and yet maintain that there can be one 'reflective equilibrium' shared by different people from different culture.[34] We may strengthen this point by contending that there are substantially moral commonalities among human beings; therefore, we share some certain basic intuitions about what is just. Since there is a high degree of uniformity in human sentiments and intuitions, it is not absurd to say that persons from many different cultures may share certain basic intuitions. Thus, contrary to what some relativists and communitarians insist, a defender of reflective equilibrium need not adopt a perspective that claims to be outside of history and culture.

David Hume's argument in the *Enquiry* might be coined to develop my apparently 'universalist' argument further. Hume, arguably an emotivist and/or a subjectivist, famously argued that even though morality is based upon sentiments, there is some sort of 'commonality' in human sentiments.[35] As he eloquently put it:

> The notion of morals implies some sentiment common to all mankind, which recommends the same object to general approbation, and makes every man, or most men, agree in the same opinion or decision concerning it. It also implies some sentiment, so universal and comprehensive as to extend to all mankind (E. 272).[36]

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[34] I realize Rawls might not share this optimism, given that even in his *A Theory of Justice* he admits the possibility of many 'moral geometries' corresponding to ways in which different societies differently describe the Original Position. Thus, his argument implies that there cannot be one 'reflective equilibrium' shared by different people from different culture. However, as I shall contend shortly, if we share some certain basic intuitions about what is just or unjust, then it is not unrealistic to say that one 'reflective equilibrium' is attainable.

[35] Some philosophers have contended that because proponents of WRE rely on 'considered judgments or intuitions, they are subjectivists in disguise. Hare, for example, opines that moral coherentism's intuitionism makes it subjectivist and, thus devoid of probative force (1981: 12, 75-6). However, I might say that the philosophical dichotomy between subjectivity and 'objectivity' is an overstatement of truth. In my opinion, a subjectivist need not deny the existence of 'objective' values. To support this 'unorthodox' claim, consider this: if I claim that torturing innocent people is morally wrong, my judgment is subjective in the sense that my feelings are the basis of my judgment. Indeed, if I did not have any feelings at all, I would not be motivated to make the judgment. However, because I also have it in mind that all normal adult agents will share my feelings about the wrongness in murdering innocent people, my subjective moral judgments will end up being somehow 'objective'. If the subjective moral judgment that I make is not shared by anyone else, it will be obvious to me that there is something wrong with my judgment.

[36] Elsewhere he put it this way: "it is universally acknowledged that there is a great uniformity among the actions of men, in all nations and ages, and that human nature still remains the same...Mankind are so much

Following Hume, we can maintain that we need not extricate ourselves from our sentiments or culture in order to attain equilibrium in the principle of justice. Since there are some morally significant commonalities, people from many different cultures can and do converge on some basic moral norms— such as persons should not kill innocent people or rape others, or enslave others (Simon Caney 2005: 45-46).[37] To this we can then add another claim: because some basic prescriptions are virtually common to all cultures, we do not differ too fundamentally in the kinds of (negative) reactions we have to those who go against such moral norms. For example, most of us intuitively condemn people who kill *innocent* people without ever giving the thought to their culture. This suggests that our own 'cultural' intuition about what is just is not idiosyncratic, but shareable with others from different culture. Since moral judgments do not occur in a solipsistic universe, coupled with the fact that there are some commonalities among human beings, we can conclude that there can be, to adopt a terminology created by Rawls (1993), an international 'overlapping consensus'[38] on *some* values.[39]

A communitarian/relativist might object that the claim that our 'intuitive' natures are sufficiently alike for us to share some common moral judgments is empirically false, since in our ordinary life, we do not always share the same intuition about what is right. Thus, the objector might hold that the argument from 'shared intuition across culture' cannot give us any independent criterion by which to evaluate competing theories, resulting in a 'universal' equilibrium. However, while there is some truth in this criticism, the empirical claim upon which the criticism relies is far too sweeping to be credible: First, we cannot rule out the fact that our 'shared intuitions' and similarities far exceed our differences. Second, the 'shared intuition across culture' argument does not say that *all* human beings (everywhere) share the same intuitions. Rather, it makes a modest claim that notwithstanding some obvious differences between different persons from different cultures, there are *some* basic moral convictions or intuitions that are common to most human beings: it refrains from claiming that *all* human beings share the same intuitions. I am stressing this point to avoid being accused of subscribing to the doctrine of

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the same, in all times and places, that history informs us of nothing new or strange in this particular " (E. 83).

[37] For Rawls in *Political Liberalism*, this may not be enough for the overlapping consensus that has arisen in Industrial and post-Industrial societies in the West since the Reformation.

[38] He introduces this in PL, where it is explicitly restricted to modern industrialized democractic societies.

[39] I am here registering my agreement with Thomas Pogge that people of different faiths or secular traditions (what Rawls terms comprehensive doctrines) can converge upon some common values (See Pogge, 1989: 227-30, 269).

'transcendental' essentialism, according to which human beings everywhere share certain invariant, and abstract unchanging properties or identity. To say that we share some moral convictions in *common* is not the same as saying that we are *identical*.[40]

It might be replied that my concession that we share only some moral convictions undercuts my general thesis that we can attain one equilibrium point shared by people from different cultures. We cannot, the detractor might insist, attain a reflective equilibrium because of some profound and insurmountable disagreement across the world on *some* moral convictions.[41] Admittedly, there are certain complicated ethical and political issues that apparently defy consensus or 'equilibrium'. For example, the question of abortion is so intractable that it is unrealistic, if not impossible, to expect complete agreement on the moral and ontological status of the fetus *within* cultures, let alone *across* cultures. Fortunately, most of the ethical and political debates are not as complex as the debate about abortion. Thus, we can 'converge' on certain basic moral convictions— such as people should not kill innocent persons. In sum, the fact that we cannot reach consensus on certain complicated ethical and political matters does not necessarily undermine the claim that we can converge on a common or *shared* wide reflective equilibrium. A comparison will help to illustrate and strengthen this point. Science is supposed to furnish us with an 'objective equilibrium.' It has not, to my knowledge, been advanced as a decisive argument against scientific 'equilibrium' that scientists sometimes lack unanimity. Even though there are some complicated matters that scientists cannot agree on, we are still convinced that there are many simpler matters about which all competent scientists agree. Analogously, as long as there are simpler numerous ethical and political issues, talk of convergence or equilibrium should not be considered out of place. Of course, one might challenge this claim by saying that we cannot agree on *even* the 'simple ethical issues'— such as slavery is unjust and killing innocent person is unjust. After all, the argument continues, some people *still* defend slavery and some still justify the killing of innocent persons. My response is that those people who do so possess idiosyncratic moral conviction that leads them to 'justify' things most people normally do not justify. Sure, their eccentric 'intuition' about what is just would render common agreement even in 'simple' ethical issues impossible. However, this divergence of moral convictions can— and indeed should— be dismissed as a case of idiosyncrasy. Thus, we can stick to our claim that since some of our intuitions and moral convictions may be basic and common among *most* reasonable people, the notion of WRE cannot, and should not, be dismissed as a myth.

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[40] Richard Rorty (1989), an opponent of essentialism and universalism, is famous for contending that since there is no such thing as 'common human nature', universalism is false. However, one might say that Rorty conflates commonality with identity. The fact that we share certain intuitions in common does not mean we have the same identity.

[41] One might reject my reply to the libertarian as out of place, since it mistakenly assumes that the relevant WRE takes into account a "we" of unlimited scope. Admittedly, this is a powerful objection to my argument, given that WRE does not really require everyone in the world at any time to have some belief or beliefs in common. Indeed, nothing in WRE requires a guarantee that others will have the same equilibrium. However, while there is no guarantee that virtually anyone who ever existed will participate in the equilibrium; we can arguably say that when it comes to certain uncontroversial moral issues *most* people will participate leading to virtually the same equilibrium. In any case, since libertarians imply that the plausibility of their doctrine of self-ownership is so intuitively plausible that everyone everywhere will accept the doctrine, they are somehow committed to agreeing with me that convergence or one equilibrium is not always an impossibility.

To bring this section to a close, I would like to merely mention another common objection leveled against the method of WRE: WRE presupposes a moral realism, and the latter, it is argued, is metaphysically mysterious, and thus incompatible with practical morality. Moral realism, as I understand it, is an *ontological* view which says that moral qualities or facts exist independently of the opinions of human beings. Thus, moral realists are committed to holding the *metaphysical* view that there are moral facts over and above what is *known* to actual human beings.[42] That said, it should be noted that some contemporary moral realists have contended that realism need not commit us to believing in the existence of some dubious metaphysical entities like Plato's Forms or Moore's non-natural inherent values. Peter Railton, for instance, has recently argued for a naturalistic moral realism, according to which the existence of moral features is contingent upon the existence of human beings. Thus, Railton's realism denies the existence of mind-independent moral facts.[43] Just as it would not make any sense to talk about the temperature of humans if no humans existed, so it would not make sense to talk about human values if no human beings existed. In short, the naturalist moral realist claims that moral features depend on the existence of human beings. As Railton dramatically puts it: "Good and bad would have no place within a universe consisting only of stones, for nothing matters to stones. Introduce some people, and you will have introduced the possibility of value as well" (Railton 2003: 46). In effect, Railton does not share with the non-naturalist realist claim that moral truth comes to us from a mystical non-empirical source.[44] However, since those who see a correlation between WRE and moral realism construe the latter in terms of the existence of 'mind-independent moral facts', I will not concern myself with the naturalistic moral realism.

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[42] Moral realism is so broad a doctrine that it is virtually impossible to provide a definition that captures its various components. Suffice it to say that it has metaphysical, semantic and epistemological components. Its metaphysical component is often characterized as "mind-independence". That is, it claims that the existence of values is independent of our opinions and beliefs. Its semantic component is usually associated with moral cognitivism—a doctrine which says that moral judgments assert propositions which are true or false. The epistemological component of moral realism acknowledges the possibility of moral knowledge.

[43] Railton's naturalistic moral realism is comparable to Nozick's 'realizationism'. In his *Philosophical Explanations*, (1981) Nozick distinguishes five theories of objective value and comes down in favour of realizationism: "We choose or determine that there be values, that they exist, but their character is independent of us" (1981: 555). Thus, Nozick would join Railton in denying the non-naturalist realist claim that values exist independently of human beings. To be sure, he explicitly rejects the non-naturalist realist or Platonist view that "values do exist; they exist and have their character independently of our choices and attitudes" (Ibid. 555).

The relationship between WRE and moral realism has been one of the contentious issues. On the one hand, some philosophers have invoked the WRE to defend moral realism. Here, I have in mind David Brink (1989) who has contended that "because there is reason to treat considered moral beliefs as generally reliable, coherence with, among other things, considered moral beliefs can be evidence of objective moral truth" (Brink, 1989: 133). In the view of Brink, the method of reflective equilibrium is truth conducive; therefore, when we undertake the process of WRE the theory that we converge will be the true theory of the subject matter. In effect, Brink insists that a coherence theory of moral justification is compatible with moral realism. Contrarily, some philosophers have denied the association of WRE with moral realism. Donald Dworkin (1973), for example, has vehemently rejected moral realism and the claim that the method of WRE epitomizes moral reality. It is the central contention of Dworkin that WRE undermines moral realism. While I believe one might legitimately contend that WRE is a sign that there is correspondence between one's beliefs and an independent moral reality, in my opinion, one can consistently subscribe to the method of WRE without affirming or denying moral realism. Put otherwise, one need not be an antirealist or a realist in order to defend the WRE. In making this statement, I am agreeing with Rawls who endorses a meta-theory that steered clear of moral realism or its denial. Let me explain further why I think Rawls is right in avoiding 'metaphysical' issues.

The way I see it, political philosophy need not take sides on certain central philosophical issues within metaphysics and epistemology, as if it would have to be decided in advance which metaphysical and epistemological positions are correct ones for a political philosophy. Firstly, it is extremely unlikely, if not impossible, that these branches of philosophy will ever provide knockdown arguments so as to settle their most hotly debated matters once and for all. Secondly, even assuming I am wrong in thinking such arguments will not see the light of day, one could not do political philosophy until they come around if one thinks political philosophy can't get started without prior resolvement of certain metaphysical and epistemological questions: one would have to just sit down and wait for the answers, or engage in metaphysics in order to help bring them about. In short, in my judgment, the issue of the existence or non-existence of 'moral truth' belongs in the basket of metaphysical questions that should be dealt with outside the field of *political* philosophy. Therefore, I find myself in complete agreement with Rawls's steering clear of moral realism or its denial.[45]

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[44] Similarly, Nagel believes that his realism is not committed to any sort of 'transcendentalism'. For him, pain, for example, exists even though it cannot be 'empirically' seen from the outside. While the pain is invisible, it is not metaphysically 'queer', since it is something one feels it. Accordingly, being in pain gives you an objective reason to get rid of it. If you deny that pain is real, says Nagel, then "you couldn't even say that someone had a reason not to put his hand on a hot stove, just because of the pain. Try looking at it from the outside and see whether you can manage to withhold that judgment" (1986: 157).

That Rawls is not interested in 'metaphysical' issues is evidenced in his later writings, where he presents Justice as Fairness as political, not metaphysical: a free-standing view.[46] That is, when Rawls "politicizes" justice in his later work, he does not arrive at that by drawing out implications of WRE, but rather as an idea for getting on with theorizing about justice without getting hung up on intractable metaphysical issues. Rawls overtly speaks of justice as fairness as a political concept independent of controversial philosophical, moral and religious doctrines, and arising from an interpretive understanding within the traditions of constitutional democracy. To be sure, he bars comprehensive philosophical views, including those about moral truth, from playing any role in seeking the political reflective equilibrium involved in overlapping consensus. Thus, it is reasonable to say, with Rawls, that the method of WRE is neither meant to give nor refute the realist account of moral truth. My argument sketched above, as we have seen, does not posit moral truth, but relies rather on the assumption that persons throughout the world possess certain morally relevant peroperties in common. Accordingly, we can converge in an "ovelapping consensus" on a conception of justice. However, *that* convergence should not be taken as evidence for the existence (or denial) of moral truth.

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[45] One might say that since I have argued in favor of "(virtual) moral universalism", I am committed to supporting moral realism. However, this claim rests on the unspoken and mistaken assumption that all moral universalists are moral realists and vice versa. It should be made clear that while all moral realists are universalists, not all universalists are moral realists. A person who believes that *some* values are shared by all human beings is certainly a universalist but not necessarily a realist. The existence of the "shared" values is contingent upon the existence of human beings. Thus, one can affirm the existence of some 'shared values' and consistently deny the moral realist claim that moral facts exist independently of the existence of human beings.

[46] Even in his earlier work, Rawls never claimed that what emerged from his contract and other justificatory conditions were "truths" of justice. Rather, the method of reflective equilibrium suggested ways in which convergence might be achieved among those who began with disagreements about justice.

It may be appropriate to sum up here. Following Rawls (1971), I have argued that the most plausible way of engaging in political philosophy is to strive for 'reflective equilibrium' between moral theories and our intuitions. If a theory has conterintuitive implications, then this is evidence to dismiss the theory as implausible. Thus, I have contended that the doctrine of self-ownership, as long as it justifies volunatary slavery, can be dismissed as conterintuitive. Furthermore, I have maintained that the recognition that others are fundamentally like ourselves in having certain moral convictions gives us powerful reasons for accepting the method of WRE, even if the method is saturated with intuitions. I suspect those who object to any use of moral intuitions may find my defense of WRE unconvincing. Regardless, the libertarian is not entitled to reject the method of WRE on the grounds that it relies on intuition: Libertarians, as we have seen again and again, ground their entire doctrine of self-ownership *exclusively* on human intuition, suggesting that the intuitive plausibility of the doctrine exonerates them of providing any philosophical justification.[47]

Self-Mutilation and Self-Ownership

It is characteristics of Nozick and libertarians to assume that if one is prevented from damaging part of oneself, then one does not fully own oneself.[48] Nozick speaks for libertarians when he maintains that "the central core of the notion of a property right in X, relative to which other parts of the notion are to be explained, is the right to determine what shall be done with X" (ASU: 171). For the libertarian, if one has a right to acquire property, then one has also a right to dispose of or even demolish it. Because our rights are things that we exclusively own, from the perspective of libertarians, individuals may do what they wish with what is rightfully theirs, no matter how outrageous it is. To illustrate, if I own my arm, then I am entitled to use it any way I wish: I can decide to hew it from my body and sell it to a cannibal. If the state forbids me to sell my arm, libertarians would say that my arm is not properly or fully mine; I am partially owned by the state.

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[47] To forestall any misunderstanding, I am not saying that all those who rely on 'intuitions' are supporters of WRE. I am aware that relying on one's intuitions is one thing, relying on WRE seems to be another. Gauthier, for example, has the intuition that is axiomatic for him, that morality must be consistent with the demands of practical agency, as he understands it. But he is certainly no friend of WRE! However, I believe that any theory that is devoid of counter-intuitive implications will be congruous with the method of WRE. In Chapter two, I argued that what is wrong with Gauthier's strategy, a strategy which purportedly draws on the foundations of practical agency, is that it arrives at a view that has counter-intuitive implications. Thus, it is not surprising that Gauthier detaches his 'intuitionistic' theory from WRE.

[48] Of course, this is an overstatement, as it seems to imply that I 'partially' take away your self-ownership if I keep you from walking off a cliff.

However, in my opinion, libertarians err in assuming that just because a thing is mine, I can destroy it or do whatever I want with it. To see why they are mistaken, let us come back to the arm example: it seems perfectly logical and plausible to say that I own my arm without the arm being literally mine in the sense that I can also sell or destroy it. The arm is *mine* in the sense that it is part and parcel of my body; therefore, I alone *own* it. Since I exclusively and unilaterally own it, no one has the right to separate it from me. But there is no 'right or legal equivalence' between the ownership of my arm and the property right in, say, my car: No one has the right to snatch my legitimately acquired BMW car from me; I alone have the right to *sell* the car to whomever I want. However, the same cannot be said of my arm: from the fact that no one is entitled to separate my arm from my body — because it is *mine* — does not imply that *I* can sell it or purposely destroy it. It makes no sense to say that because I am prevented from selling my arm or obliterating it, the arm is not mine. Whose is it! Simply put, I still own my arm even if the law prevents me from cutting it off. Body-ownership, in my opinion, does not necessarily entail the right to destroy, or dispose of, one's body or property.[49] I am here rejecting the libertarian core claim that the absoluteness of the right over an object, including the right to destroy it, portrays its status as genuine ownership: I am still the bona fide owner of my body even if I am prevented from destroying it!

It might be replied that if we accept the idea that governments are justified in preventing competent adults from deliberately 'mutilating' their bodies, they might end up stopping well-informed adults from having tattoos and/or other minor 'harmless' marks on their bodies. Where do we draw the line, the libertarian critic might query? In short, the critic might ask me to show how to avoid a slope made slippery by my line of reasoning. I admit that it is not always easy to tell where the line should be drawn. That conceded, I believe there are certain acts that most 'normal' human beings will find morally and intuitively objectionable. For example, as we just saw, it sounds intuitively implausible, if not unthinkable, to say that individuals can consent to be tortured, maimed and even killed. Indeed, nobody (barring some libertarians, of course) will sincerely say that governments act illicitly by using force to prevent individuals from chopping off part of their bodies for sale. On the other hand, most reasonable people will condemn governments who forcefully prevent its citizens from having nose rings or tattoos. Even those who find these seemingly 'innocuous' acts (nose rings and tattoos) morally offensive due to their religious beliefs will, presumably, agree with libertarians that governments should "leave these competent individuals alone". In short, we can forestall the libertarian slippery slope 'objection' by saying that governments are justified in stopping people from engaging in only acts that are unquestionably and intuitively repugnant. [50]

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[49] To be sure, the legal constraints on property rights presuppose that talk of conditional ownership over a property is not absurd and hence one cannot always legally destroy one's property with impunity. In most countries, including Canada, if one deliberately destroys one's legitimate valuable holdings, such as money, one is penalized for that. In fact, we have a real example supporting this claim: In Ghana, a foreign sailor once tore up a currency of Ghana which he had legitimately earned. His reason was that he could not use the money in his home country. He was instantly prosecuted for disrespecting the government of Ghana. For it is believed that even though individuals own their legally earned money, the currency ultimately belongs to the government. The citizens are "conditional owners", that is, their holdings are conditional upon making "good" use of them.

In effect, libertarians' claim that body-ownership implies the right to mutilate or dispose of one's body is intuitively unacceptable. I think whereas our intuition would respond poorly to laws which prevent people from disposing of their legitimate owned cars, the same intuition would respond *favorably* to laws which forbid people from selling their arms. This suggests that our intuition about property "in our own persons" is much weaker than Nozick and libertarians proclaim.

If my analysis is right, then we can cast doubt on the plausibility of libertarians' fundamental thesis that one's right to one's body is akin to one's right to material property. This step paves the way for us to reject the libertarian derivation of absolute property right from absolute "self-ownership." If, as I have argued, the right to our own bodies is not unqualified, then Nozick and libertarians cannot capitalize on the intuitive appeal of the thesis of self-ownership to argue for inviolability of all rights, be it property in material things or property in immaterial things. Given that the right to our bodies is qualified in many ways, the doctrine cannot generate a good deal of force of libertarian arguments for *strong* property rights. That argued, for the sake of further development of my thesis, I will discount the above objections and grant with libertarians that we own ourselves; therefore, we can do whatever we want with our self-owned bodies including destroying or selling them. However, the question I would like to pose is this: Does the endorsement of self-ownership commit one to endorsing absolute property right in *external* resources? Can we legitimately extend our basic body rights into the external world, and thus generating unlimited external property? The bulk of the remainder of this chapter will be devoted to addressing this contentious issue.

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[50] Of course, you don't have to be a libertarian to have reservations about this appeal to what is held to be deeply repugnant. Indeed, history is strewn with deep moral repugnancies that turn out to have been prejudices. That said, it cannot be denied that certain acts, such as selling oneself into slavery and mutilating oneself, have been consistently dismissed as morally abhorrent. Locke, Kant and most philosophers before and after them rightly dismissed those as morally appalling. We cannot justify certain palpably repugnant acts on the grounds that we have been 'wronged' in the past in condemning certain acts. If this were the case, then we couldn't pass judgment on anything, no matter how abhorrent that thing is!

Can Self-Ownership Yield Absolute Property-Ownership?

What draws the libertarian to make the property-body connection is the notion that in a free society both types of rights would be absolute rights — that is, rights relatively immune to state regulation and restriction. Libertarians draw connections between person's rights and property rights so that the strength of people's commitment to strong bodily rights flows into a commitment to strong property rights. Nozick, for one, as we saw in Chapter three, contends that because the (Lockean) rights to health, life, and liberty are inviolable, property in material things is equally inviolable. He holds this view because he presents property right in material things as a natural concomitant of self-ownership. Against libertarians, I will argue that property rights cannot extend beyond self-ownership; consequently, the libertarian cannot ground property in material things *exclusively* in self-ownership. In other words, my principal aim in this section is to undermine the claim that people have strong ownership rights in external goods that make morally impermissible most forms of government interference.

Nozick wants us to believe that resources in the state of nature are strictly ownerless; therefore, everybody is entitled to them. However, as I argued at length in the previous chapter, Nozick cannot coherently hold this view owing to his leaning on Locke's proviso. No matter what his protestations are to the contrary, Nozick, as I contended, relies implicitly on the doctrine of common-ownership. Since, by his own admission, his entire political theory cannot stand without the Lockean proviso, he has to accept the premises that resources are commonly owned. He cannot consistently embrace the proviso and discard the initial egalitarian premises that it carries. Given Nozick's overt endorsement of the Lockean proviso, and given his unwillingness to relinquish his attachment to the proviso, I "imposed" the common ownership premise on him in Chapter 4.

Armed with the presumption that Nozick "accepts" Locke's initial collective ownership premise, let us now return to the kernel of our argument in this section: Whether or not Nozick is justified in deriving absolute property right from the doctrine of self-ownership. I think before we can provide any satisfactory answer to this question, we first have to find out whether or not we own the external resources in addition to owning our labor since production cannot take place without external resources. For it is obvious that one cannot derive property ownership from self-ownership if one does not own both oneself and the thing (i.e., external resources) which makes property procurement possible. This being so, Nozick's intimate association of self-ownership with property ownership seems to presuppose that the two are always owned by one and the same person. In fact, he alludes to the fact that one's ownership cannot be extended to what one does not exclusively own when he writes: "No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over" (ASU: 238). Here, what Nozick is insinuating is that if you do not single-handedly have a right to something, then other people, that is, all the co-owners equally have rights to the same property. If all one's ownership amounts to is the ownership of oneself, i.e., one's labor, talents and other "internal" qualities, then *perhaps* we will not have any qualms about Nozick's thesis of self-ownership in general.[51] But for Nozick and libertarians, property rights are an extension of self-ownership. Our self-ownership, they maintain, also entitles us to claim ownership of external resources. As I aim to demonstrate, the libertarian claim to this *more* extensive right is both intuitively and philosophically unwarranted.

In ordinary discourse, when a person claims that s/he owns himself or herself, we hardly conceive that s/he is saying something about owning external resources as well. We tend intuitively to take the thesis of self-ownership and property-ownership to be two different notions. As Cohen puts it "While the principle of self-ownership says that each person is entirely sovereign over herself, it says, on the face of it, nothing about anyone's rights in resources other than people, and, in particular, nothing about the substances and capacities of nature, without which the things that people want cannot be produced" (1995: 13). Succinctly put, our intuition seems to sever rights in resources from rights in ourselves. Indeed, some of Nozick's overt criticism of Locke seems to support this intuition. That is, his argument against Locke appears to commit him to rejecting the libertarian thesis that self-ownership can generate absolute property. Nozick rejects Locke's 'labor mixing' argument precisely because he thinks that our entitlements ought to be confined to what we own. Let us refresh our memories of Locke's mixing labor theory and Nozick's subsequent criticism of it. According to Locke's mixing labor theory, since one owns one's ability to labor, by mixing one's labor with resources nature provides for the common use, one is legitimately entitled to appropriate the product of the earth one toils as well as the land one works on as long as the goods appropriated do not go to waste and that there be "enough and as good left in common for others" to use. In short, Locke uses the idea of "mixing one's labor" to provide the basis for an account of the genesis of property rights in the state of nature. Nozick famously stigmatizes Locke's 'mixing labor' argument asking sardonically:

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[51] One might argue that we may *still* have qualms about the thesis of self-ownership owing to its radical consequences. As I have indicated before, self-ownership is compatible with even voluntary slavery; most of us intuitively believe that voluntary slavery is debasing.

> Why does mixing one's labor with something make one the owner of it? ... But why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice? (ASU: 174-75).

Locke, according to Nozick, might answer these questions by saying that mixing one's labor with something enhances the value of the thing, and people are entitled to own things whose values they have created. However, Nozick dismisses this line of reasoning as unpersuasive. He, again, sarcastically asks: "why should one's entitlement extend to the whole object rather than just to the added value one's labor has produced?" He continues: "it will be implausible to improving an object as giving full ownership to it…" (Ibid. 157). In short, from Nozick's standpoint, Locke's theory fails to explain why one has a right either to the object or to that part of its value not due to one's labor. The bottom line is this: Nozick dismisses Locke's entire labor mixing as a just criterion for initial acquisition on the grounds that *one's ownership cannot be extended to something one labor has not produced.*[52]

In my opinion, Nozick's criticism misses the point of Locke's core argument: Locke's point is that a person who significantly mixes his/her labor with resources substantially alters it, and thus is solely responsible for whatever value or utility the resource has come to have. Locke, contrary to the view Nozick is attributing to him, is not saying that if you spill your tomato juice sloppily in the sea, you own the sea. You cannot own the sea because you have not significantly altered it. Indeed, Locke would most probably say that you have rather "devalued" the sea by "polluting" it with your tomato juice. Given Locke's claim that "nothing was made by God for Man to spoil or destroy" (II, 31), coupled with the fact that your tomato juice has somehow "spoiled" the sea, Locke would presumably say you ought to be castigated, rather than "rewarded" with the ownership of the entire sea. Contrary to Nozick's reading, it is not likely that Locke is at this stage of his argument appealing to a theory of added value, since some of the examples of labor that he uses (picking up acorns, grazing one's horse etc.) are not really cases where labor would be thought to add value. Locke, in my judgment, invokes his theory of labor mixing to make a point that no one has natural rights to the products of other people's efforts and endeavors. In short, the theory of labor mixing essentially holds that what one can make by one's labor naturally belongs to that person. The theory simply stresses the popular dictum: *the right of each to his labor.* I do no think Nozick can, in all sincerity and consistency, deny Locke's claim that one has a right to one's labor.[53]

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[52] This point is crucially important since, I believe, the same point that Nozick makes against Locke's argument can be used to reject his own derivation of absolute property right from self-ownership. In other words, I will contend that his argument against Locke carries with it the seed of its own destruction.

To be sure, despite his criticism of Locke's mixing of labor formulation, he clandestinely concurs with Locke that it is labor that justifies the institution of private property. For example, in criticizing patterned principles of distributive justice, Nozick writes: "Patterned principles of distributive justice involve appropriating the actions of other persons. Seizing *the results of someone's labor* is equivalent to seizing hours from him and directing him to carry on various activities" (ASU: 172 my emphasis). Here, Nozick is, without a doubt, tacitly joining Locke in justifying private property on the basis of an individual's personal investment of labor.[54] In this passage, Nozick appears to agree with Locke that since labor justifies property right, depriving a person of a transformed object by a person's labor is tantamount to seizing that person's labor. Indeed, Nozick entitlement theory carries Locke's thesis that an object that is transformed by an agent's labor is supposed to belong to the agent whose labor converted the object. Given that Nozick accepts Locke's dominant thesis that individuals own their ability to labor, there is something puzzling about his unsympathetic denunciation of Locke's entire mixing-labor argument.[55]

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[53] I think Onora O'neill is right when he contends that: The questions [Nozick] raises about Locke's theory are hilarious-and penetrating-piece of philosophical writing. But the fun Nozick gets from exploring Locke's problem is merely fun; it is not demolition" (1982: 311-312).

[54] It might be replied that there are different ways of owing property and "labour mixing" is *only* one of them. For example, it might be argued that gifts and inherited capital are parts of a person's property but they have no element of a person's "labour mixing" in them. While it is true that property may come to us through gifts or transfers from previous owners, this fact does not undermine Locke's argument that labour solely justifies private property. This is so because all transferred property traces its existence to appropriations of previous owners, and previous owners acquire property rights over some previously unowned material resource by mixing their labour with it. So, in support of Locke, it can be concluded that all gifts and transfers still have "labour mixing" with them.

Anyway, we may pass over this objection and grant that Nozick's argument against Locke's labor theory is unassailable. However, the supposed "unassailability" of his argument, as I aim to show shortly, carries with it the seed of its own destruction. Specifically, Nozick becomes a prey to his own criticism (of Locke) when he maintains that we own whatever is generated by self-ownership. We might throw his own rhetorical question back at him: Why is what we own (self-ownership) extended to parts of the external world (collective-ownership)? And why isn't mixing self-ownership (what I own) with what I don't exclusively own (external-resources) a way of losing my self-ownership rather than a way of gaining unconditional property-right in part of the external world? In short, Nozick owes us an argument justifying why one's entitlement should extend to the whole object rather than just to the added value one's labor has produced. Until and unless he does so, it is fair to say that his claim to a more extensive or absolute right is unwarranted.

The bottom line is that the logic of Nozick's own argument against Locke's labor theory commits him to rejecting any inference of absolute property rights from the premises of self-ownership. In other words, if his contention against Locke's labor theory is something to go by, then his own argument will be in trouble. Self-ownership is not owned in common with others and hence one might be left free to do with one's body as one chooses.[56] But the same cannot be said about the external resources which are collectively owned: any single person cannot be left to do with the natural resources as he chooses. Since self-ownership is *singularly* owned, while property right is *collectively* owned in the sense that it has elements of nature in it, Nozick cannot, with justification, say that an infringement of property-ownership necessarily implies an infringement of the thesis of self-ownership. Given that human beings are incapable of creating things *ex*

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[55] One might say that Nozick is merely being very critical of an idea with which he himself basically agrees (and thus being self-critical as well). But if that is the case, then one might say he is not being fair to Locke for denigrating his (Locke's theory), a theory to which he covertly subscribes.

[56] It is not always easy to demarcate between when one ought "to be left alone" and when one's self-ownership calls for interference. This is because the doctrine of common ownership can have adverse effects on one's self-ownership; it can sometimes impose restrictions on people's self-ownership. For example, if you are contemplating committing suicide, you have to take into consideration the fact that your carcass can create eyesore to a lot of people who have the right to walk freely on the earth. Collective ownership can, therefore, be invoked to prevent you from taking your own life, contrary to what Nozick believes. As Cohen eloquently puts it, "the world's joint owners might be thought to have the right to forbid one to die on the ground, for example, that one's dead body might pollute some of the world's resources" (Cohen: 1995: 99).

nihilo, in the way the omnipotent and omniscient God does, we cannot claim limitations on ownership of external goods necessarily involves interfering with a person's right to the exclusive use of his/her body. Consequently, contrary to what libertarians insist, removing someone's acquired private property may not be as outrageous as removing that person's arm.

We are therefore led to the conclusion that since creating absolute property rights is something a person lacks the power to do, the thesis of self-ownership cannot provide any knockout argument against the reshuffling of resources through taxation and welfare programs, as Nozick would have us believe. This step easily paves the way for contending against the libertarian core thesis that taxation and welfare state services inevitably violate self-ownership. Indeed, in the Nozickean society, appropriators can be legitimately taxed for using resources that belong to mankind in general without violating their self-ownership. Stated differently, a defender of the doctrine of self-ownership can consistently support taxation via redistribution by arguing that we are taxed for using resources that belong to mankind in general; we are not taxed for owning ourselves. This claim will be explored in greater detail later in this chapter. But in the meantime, we may aver that the fact that people who are jobless do not pay "labor-income" tax even though they own themselves seems to buttress the contention that self-~~ownership~~ and "external ownership" are two separate, if not distinct, doctrines.[57]

The "Uselessness" of External Resources: The Libertarian Response

Some libertarians, as we shall see shortly, have invoked the so-called Labor Theory of Value to sidestep the criticism that self-ownership is not sufficient to generate absolute property right. According to the labor theory of value, labor is an act of creation rather than one transforming pre-existing objects which persist throughout the transformation. Since labor is exclusively responsible for creating new objects, they cannot be part of what is held in common; these objects are created by man rather than by God, and so are not part of what God gave to mankind in common. In short, libertarians who endorse the labor theory of value insist that natural resources are, by themselves, useless; human effort is solely responsible for exclusive appropriation. Narveson, for example, reacting to the claim that the rich can justifiably be taxed for using natural resources heatedly writes: "It is their talents, skills, knowledge, personalities, together with the enterprise, skill and knowledge of those who work with them, and the high demand of the public for displays of their particular talents that gets them those high incomes" (1988: 16). Edward Feser has exhibited similar reasoning when he claims that

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[57] Nozick and libertarians specifically argue against taxation of ***earnings from labor***. This is not to suggest that libertarians embrace other forms of taxation, such as tariffs or property rights. Indeed, libertarians would tie other forms of taxes to labor. For example, they would contend that in collecting a sales tax every time a person buys certain products, the state is claiming a slaveholder-like right over the product of that person's labour, thereby violating his/her self-ownership. Thus, libertarians might conclude that as long as those who are jobless pay sales tax, their self-ownership is unjustifiably violated. But this response errs in assuming that we can separate what is due to labor from what is due to external resources. If, as I have argued, production is as a result of both labor and resources, then there can be no such thing as pure labor-income tax. Also, even if, for the sake of argument, we concede that self-ownership rules out income taxes, it is not clear how it can rule out other taxes such as bequest tax. In short, since the state takes a share only from the property of those already dead, it would sound quite bizarre to claim that bequest tax is equivalent to forced labor!

> The common-ownership advocate also has to face the difficulty that 'resources' by themselves are pretty useless; one has to *do* something to make them usable (digging, collecting, refining etc.). Therefore, in forcibly redistributing those resources, one is inevitably forcing redistributing the value produced by people's labor, thus violating self-ownership (Feser 2004: 63 fn. 16).

If the libertarian claim that natural resources are inherently worthless is a valid one, then, contrary to my argument in Chapter four, Nozick's endorsement of the Lockean proviso would not make him a 'non-libertarian redistributivist'. For in redistributing the "valueless" raw resources, we are not really redistributing the value produced by labor; therefore, we are not violating anyone's right to labor or property. In short, *if* it is the case that natural resources are absolutely useless[58], then the Lockean/Nozickean proviso could be made to cohere with the tenets of the libertarian political philosophy. To be sure, it has been said that since Locke endorses the labor theory of value, his claim that natural resources belong to mankind in general does not entail redistribution of resources produced by labor.[59] In other words, according to this argument, since Locke's labor Theory of Value carries the thesis that labor is responsible for all of the value of things, his proviso (that is, his claim that enough and as good resources be left in common for others) is consistent with the libertarian anti-redistributivism. I will not deny that in certain passages Locke creates the impression that natural resources belonging to mankind in general are useless. Nor will I deny that he sometimes appears to underestimate the contribution of resources to production, contributing to the popular "uselessness of natural resources" interpretation. For example, consider the passages below culled from Locke's *Second Treatise*:

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[58] The libertarian general claim that natural resources are useless is sufficiently discredited by noting that water quenches thirst. That is, water is 'one 'of the natural resources, yet as long as it helps us to quench thirst is enough to conclude that it is useful!

[59] Professor Allen Carlson, for example, expressed this sentiment during my doctoral candidacy examination. According to him, since Locke maintains that labour is solely responsible for production, proponents of the Lockean proviso, including Nozick, are not committed to redistributivism. In what follows, I will contend that there is no textual evidence for this interpretation of Locke and the Lockean proviso.

> "Nature and the Earth furnished only the ***almost*** worthless Materials, as in themselves" (II, 43-44, emphasis mine).
>
> "I have rated the improved land very low in making its product but as ten to one, when it is much *nearer* an hundred to one" (II, 37, emphasis mine).
>
> "I think it will be but a modest Computation to say, that of the Products of the Earth useful to the Life of Man 9/10 are effects of labor: nay, what in them is purely owing to Nature, and what to labor, we shall find that in most of them 99/100 are wholly to be put on the account of labor" (II, 39).

Undoubtedly, these passages have significantly encouraged the *mis*reading that Locke supports the view that natural resources are utterly worthless. That said, while Locke appears to devalue natural resources, it is a mistake to attribute to him the view that labor is *solely* responsible for *all* the production. In all his political writings, nowhere does Locke explicitly or tacitly say that natural resources are *totally* useless. As evident in the above quoted passages, Locke circumspectly uses words and figures such as "almost, "nearer" "9/10" "99/100" to give the lie to the libertarian interpretation. Although these words and figures clearly suggest that Locke somehow exaggerates the important role labor plays in production, he nowhere says that 100% are to be put on the account of labor. Without a doubt, the value he puts on natural resources is unacceptably infinitesimal; nevertheless, it is still greater than zero percent—which is enough to falsify the claim that they are valueless! Therefore, in my judgment, the long-standing notion that Locke regards natural resources as completely useless is an unwarranted dogma based on an inattentive or distorted reading of Locke. Indeed, if Locke really held the view that natural resources were of no value, his entire proviso which says "enough and as *good* left in common for others" would be meaningless: if land and other natural resources are completely useless, how can we know for sure that what we have left for others are "good enough" before appropriation takes place? And even if we knew, why do we have to worry about leaving "as good as what we take"? If we left them 'worse off' than what we took to appropriate, wouldn't their labor put an appreciable value on it? In short, it is plain that Locke could not possibly hold the "uselessness of resources" view, as it stands. For if it were his view, it would seriously clash with much else he says about his proviso.

In my view, Locke invokes the so-called labor theory of value to play up the point that without labor, production cannot take place and hence labor deserves to be awarded a price. Predictably, he wants to say that, no matter how useful natural resources may be, without labor, they cannot be responsible for production. This claim seems to be supported by both logic and common sense, since even the most fertile land cannot bear crops without labor working on the land. The fertility of land can only be realized when labor is mixed with the land. This, I think, explains why Locke holds that laboring is the basis on which property entitlements are established. It is worth pointing out that Locke did not invoke his labor argument to question the value of natural resources. Rather, he invoked it to defend private property. According to him, since labor enhances the *value* of the natural resources, private property is beneficial to all. He justifies this claim by contending that in taking land and making it *more* valuable, one reduces the pressure on other resources, and making them available for others.[60] Thus, libertarians who impute a zero value on natural resources and 100% on labor cannot invoke the authority of Locke to justify their theory of absolute right to property. Of course, my argument is not meant to downplay the important role labor plays in production. Nor is it meant to show that natural resources *alone* can bring about production. My point is that *both* human effort and natural resources play a significant role in production; the contribution of each is *indispensable*. It is worth pointing out that, having apparently extolled or idealized labor over natural resources, Locke readily and rightly acknowledges that without natural resources, labor *alone* is useless. In his own words: "the condition of human Life, which requires Labour and Materials to work on, necessarily introduces *private possessions*" (II, 35-36). In this passage, Locke could be interpreted as saying that both labor and natural resources or "materials to work on", to use his exact words, are useless on their own terms, and that the solitary input of each is invaluable.

Admittedly, I do not know how to establish how much exactly is due to labor, and how much precisely is due to natural resources. As fallible beings, we may lack an algorithm which will give us a precise answer to the question of what percentage is due to labor or resources or both. This is probably an insoluble question. But in any case, it is clear that the story is much more complicated than the libertarian allows. Since the possibility is always open that an improver is merely adding value to the commons and

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[60] Locke makes this clear when he writes: "He who appropriates land to himself by his labour, does not lessen but increase [sic] the common stock to mankind… He, that incloses Land and has a greater plenty of the conveniency's of life from ten acres, than he could have from an hundred left to Nature, may truly be said, to give ninety acres to Mankind (II, 37).

nothing more, we cannot unquestionably accept the libertarian thesis that human effort is the *sole* basis on which *unmitigated* property entitlements are established. At best, libertarians can say that labor is the source of *limited* property entitlements. This is equivalent to saying that differences in earnings are not exclusively a function of effort expended or hours worked.[61] The libertarians, in their insistence on the primacy of self-ownership, forget that natural resources, even if they are by themselves useless (which they are not), are still indispensable in a sense that they need to be owned first before labor can enhance its value. As Walter Horn has perceptively argued, libertarians overlook the fact that value adding presupposes appropriation. That is to say, before one can add value to a piece of land, one must first appropriate it (Horn 1984: 346). Thus, contrary to what libertarians insist, ownership of one's labor does not necessarily confer ownership rights on what is labored on. If, as I have argued, production results in the mutual dependence of human effort and resources, then it is reasonable to conclude that rather than labor and resources being polarized antagonists, we should regard them as an amicable team, their union and relationship being the catalyst for production.[62]

Even if, for the sake of argument, one concedes that things are exclusively due to human effort, one can consistently argue that redistributive taxation does not necessarily amount to encroachment of self-ownership. Indeed, a socialist defender of taxation might contend that things came about by human effort in part because people unjustifiably excluded others from resources—because a system of private property did exist. Predictably, our imaginary socialist supporter of redistributive taxation will remind the libertarians who insist on the primacy of self-ownership that the institution of private property has also made a contribution: Something more than just human labor is involved—in the absence of an institution of private property the effects of labor would be different. Since people have no right to exclude others in the first place, they have no right to the benefits thereby accrued. Thus, others can claim some of the benefits through redistributive taxation.

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[61] Another important consideration is rarity: The difference between long hours of labor on diamonds and the same amount of time on zirconium has to do with the relative rarity of the former.

[62] I am here distancing myself from G.A Cohen, who has famously argued that common ownership of external resources nullifies private property. According to Cohen, since natural resources are owned collectively, and since people cannot exercise their full self-ownership without the permission of others, joint-ownership undermines private property in general (See Cohen 1995: 92-102). While I agree with Cohen that self-ownership is not adequate to justify unbounded property right, I think his claim that the doctrine of common-ownership is inconsistent with private property is implausibly extreme. His argument seems to underrate the role human skills and talents play in production processes. Just as production cannot take place without the aid of external resources, it cannot take place without efficient labor. It is plausible to say that joint ownership of resources, coupled with unequal abilities and efforts, might inevitably engender inequality of resources. As long as people's talents, fortunes and vicissitudes of life differ substantially, even if we 'magically' distributed natural resources equitably, inequality or capitalism would inevitably unfold itself. In short, while joint-ownership undermines the libertarian absolute property right, Cohen goes just as far wrong in the opposite direction by contending that the doctrine of collective-ownership leads to egalitarianism. My own position, as we have seen, is that the doctrine of joint-ownership is consistent with *limited* property rights and inequality. Inequality, I think should be seen as part of the human condition which cannot be eliminated. For as long as human beings are not equal in talents and abilities, collective ownership of initial natural resources will unavoidably yield capitalism. Even if we were equal in talents and abilities, in no time at all, inequality would emerge: for some would spend their money, others would waste it, and others would invest it, or use it to start a business. Most importantly, since we have different preferences and tastes, and since what we do with the money we have usually reflects our preferences and taste, any dream of equality will remain a dream! Rawls, though egalitarian, to his credit, accepts the fact that inequality is inevitable; therefore, eliminating it is unrealistic. Thus, he contends that inequality should not be eliminated because there is another way to deal with them: the basic structure should be arranged so that inequalities work for the good of the worst off.

If my argument is a sound one, then the libertarian "uselessness of natural resources argument" is incapable of quashing my original thesis: Self-ownership in itself does not directly confer rights to land and resources, but at most only rights to whatever portion of the value of a thing is attributable to one's labor. Where the value of a thing is wholly attributable to labor, we can arguably identify the product with the labor, and derive ownership in the object from ownership of the labor. But, as we have seen, the contribution of factors other than individual labor casts doubt on whether the claims on external goods that are generated by self-ownership themselves count as unlimited ownership rights at all. Ownership of one's body and powers can provide only limited rights over external goods. In sum, libertarians vastly overestimate the extent to which the value of external goods is due to labor, rather than due both to the value of raw resources and to the existence of institution of property itself.

Taxation, Forced Labor and Theft

A common libertarian objection to taxation is that it is an unjustified interference with people's actions. Indeed, most libertarians argue against taxation on the grounds that it is unjustified interference and thus theft. Murray Rothbard speaks for most libertarians when he bluntly insists that "taxation is theft, purely and simply, even though it is theft on a grand and colossal scale which no acknowledged criminals could hope to match. It is compulsory seizure of the property of the State's inhabitants, or subjects" (1998: 162). Nozick joins Rothbard in associating taxation with theft when he claims that "Seizing *the results of someone's labor* is equivalent to seizing hours from him and directing him to carry on various activities" (ASU: 172 my emphasis). The point Nozick is trying to get across is that if you work beyond the point required to meet your basic needs, you will be coerced to work part of the time for someone else. Since the part of your labor that generates the money paid as taxes is labor you would not have performed voluntarily, taxation amounts to forcing people to work. As he memorably and pithily puts it: "taxation of earnings from labor is on a par with forced labour" (ASU: 169). His claim is meant to lay open the point that both taxation and forced labor are equally illegitimate encroachments of property rights. He holds the conviction that if you are taxed, you are indirectly coerced into working for others. "Taking the earnings of *n* hours labor is like taking *n* hours from the person; it is like forcing the person to work *n* hours for another's purpose" (ASU: 169). Simply stated, anyone who objects to forced labor and/or theft cannot consistently and simultaneously approve of taxation of labor. The essence of Nozick's argument is that, since we all condemn theft and forced labor, we all have a good reason to reject taxation.

The quick reply to the libertarian is that since most people do not see taxation as theft, the libertarian equation of taxation with theft lacks empirical warrant. For example, it might be argued that since in democratic countries, taxation is supported by a majority of citizens who voted in favor of it, the criticism that taxation amounts to theft or robbery or interference is not applicable to places in which democracy reigns supreme. Indeed, Loren Lomasky, though a libertarian, has contended that since citizens of democratic countries do not generally treat taxation as they do to theft, it is wrong to equate taxation with theft (Lomasky 1998: 362-364).

However, some libertarians, including Nozick, would regard Lomasky as a heretical deviant. Contrary to Lomasky, they would contend that taxation is theft not because majority of citizens do not treat it as theft; it is theft because the majority of citizens imposes a tax on the minority. In other words, it is the coercion or involuntariness involved that makes it theft. To strengthen their case against taxation, they would say that even in democratic countries, those who disagree with the will of the majority are not allowed to keep their hard-earned money![63] This point is brought out nicely by Edward Feser who writes: "it is irrelevant that a tax may be supported by a majority of citizens who voted for it, since those who did *not* vote for it are as coerced into paying it as they would have been if they had no vote at all" (Feser 2004: 79-80). Indeed, from the perspective of most libertarians, we are no less coerced when a majority of citizens imposes a tax on us than we would be if a single dictator did so. In other words, a tyrant who imposes his will on the citizens is as culpable as the benevolent majority who imposes their will on the minority. To be sure, this is the essence of Nozick's argument against democracy in ASU, where, in what he refers to as "the Tale of the Slave", (ASU: 290-292) he attacks the conventional accepted notion that as long as the people or their representatives voted for a policy, it is legitimate, and thus the will of a minority should succumb to the will of a majority.

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[63] In some countries, the tax officers go to the extent of confiscating "tax violator's" property. If the person insists on not paying the tax, his property is sold by the tax officers against the person's will. And the proceeds are used to settle the person's tax debt.

The gist of Nozick's argument against democracy in ASU, as we saw in Chapter two, is that individual rights as self-owners and what happens to them as individuals cannot legitimately be determined by a democratic vote. In short, Nozick vehemently repudiates democracy on the grounds that democracy permits rights restrictions that rational citizens of his minimal state would not have any reason to agree to. In deed, he condemns unrestrained democracy as a form of slavery.[64] He buttresses this point with the "just-so" story about *demoktesis*, in which people sell shares in themselves such that everyone miraculously ends up with a share in everyone else. As long as all citizens sold shares in themselves to others and these shares became equally distributed over the population, democracy would be legitimate. Consequently, the majority in a democratic election would be legitimately exercising its ownership over the minority. Of course, it is *impossible* to sell shares in all citizens in a way that everyone ends up with a share in everyone else. Thus, Nozick's "just-so" story about *demoktesis* is meant to demonstrate the absurdity of democracy.

Notwithstanding Nozick's apparent antipathy to democracy in ASU, as I argued extensively in Chapter two, he explicitly and incontestably embraces the tenets of democracy in his later writings.[65] While I will not rehearse Nozick's pro-democracy stance in his post-ASU writings, I would only point out that *even* in ASU, where he is conventionally regarded as an enemy of democracy, some of his arguments could arguably be made to cohere with democracy. For example, as we saw in Chapter one, to get from the ultra-minimal state to a minimal state, Nozick postulates a principle of compensation, according to which "those who are *disadvantaged* by being forbidden to do actions that only *might* harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others" (ASU: 82-83). Consistent with the principle of compensation, Nozick contends that since the independents are deprived of their rights to defend themselves, the agency is morally obliged to compensate them. In effect, Nozick's critical move from the ultra minimal state to a full state status involves a clear deviation from the voluntaristic ideal, and he believes the introduction of compensation justifies such a deviation or forced exchange. Relating this to our argument at hand, we could say that in democratic countries, the minimal mutilation of the minority's rights, (that is, the minority who are forced to pay tax) would only require compensation of the sort that ASU's dominant protection agency confers upon independents who are not allowed to exercise their right to enforce their rights. (I owe this point to Wes Cooper). If the method of forced exchanges or compensation is needed to explain and justify the creation of the minimal state, then there is no reason why we cannot invoke the same principle of compensation to explain why taxation can be "imposed" on the minority. Nozick's argument clearly suggests that the independents have no grounds to complain provided they are compensated. Stretching the logic of his argument, we can say that the minority in the democratic countries cannot characterize taxation as theft, as long as they enjoy the same protection as the majority. Thus, we can conclude that even Nozick of ASU is not as hostile to democracy as he would have us believe.

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[64] Given the supreme importance Nozick attaches to liberty, and given that democrats at least respect the right of the majority, Nozick would, without a doubt, prefer democracy to the alternative forms of government such as totalitarianism and dictatorship. However, since democracy is a decision procedure which usually requires, and, indeed coerces, the minority to comply with the wishes of the majority, libertarians cannot consistently subscribe to it. Thus, it is not surprising that in ASU Nozick dismisses democracy as an untenable form of government.

[65] Notably, his closest continuer conception of personal identity developed in his *Philosophical Explanations*, his explicit support for inheritance tax in the *Examined Life* and minimum wage laws in the *Nature of Rationality* are all inconsistent with his *demoktesis* critique of democracy. For a detailed argument on Nozick's post ASU pro-democracy stance, see Chapter two.

It should further be pointed out that even in his last book, *Invariances*, where he tries to remain true to his libertarian roots, there is a prima facie case that he is not averse to taxation and democracy. To be sure, he unambiguously offers a Winner Take Proportional All model of representative democracy, (2001: 266) implying that democratic voting outcomes—including a vote to support taxation—could legitimately bind the minority. Admittedly, in his *Invariances*, he tries to cling to his overt ASU critique of taxation when he writes: "All that any society should (coercively) demand is adherence to the ethics of respect. The further levels should be matters for a person's own individual choice and development (2001: 281). Nozick's point is that since the norm of voluntary or unforced cooperation constitutes the core principle of ethics, or ethics of respect, as he calls it, the further levels are purely optional; that is, they are not mandatorily imposed. In short, Nozick appears to revisit his ASU *demoktesis* critique of democracy: the minority who did *not* vote for taxation cannot justifiably be coerced into paying it.

However, despite Nozick's apparent reaffirmation of his anti-taxation, he surprisingly continues to subscribe to his principle of Minimal Mutilation, a principle which palpably presupposes that rights can be justifiably violated. To quote him: "the higher layer is to be followed when it conflicts with the more basic one but only in accordance with a principle of minimal mutilation of the lower" (Ibid. 281). To better appreciate Nozick's argument, we may distinguish the principle of minimal mutilation from the question 'who gets to do the mutilating'? While Nozick does not explicitly make this distinction, I think his post-ASU commitment to democracy seems to commit him to saying that societies acting on a collective decision procedure like majority vote may pursue higher moral goals than respect for rights, if we do so in such a way as to minimize the infringement of rights[66]. In short, the principle of minimal mutilation seems to permit democratic societies to violate the libertarian negative rights—by 'coercively' taxing individuals—in order to achieve a higher moral goal. In his own defense, Nozick might say that the acceptable level of mutilation will be set very low in a manner that prevents mandatory enforcement of higher layers. To be fair to Nozick, the principle of minimal mutilation does not give democratic societies the license to violate the rights of minorities outrageously. Indeed, part of what makes the mutilation 'minimal' is fairness to minorities, which must not suffer from a pattern of marginalization. However, this line of defense cannot absolve Nozick of the criticism that his endorsement of the principle of minimal mutilation is inconsistent with his libertarian theory of absolute rights. For why else would he incorporate the principle of Minimal Mutilation into his argument if he believed rights were absolute! The bottom line is that even if the level of mutilation is set extremely low, it will still involve infringements of rights. While Nozick does not tell us what counts as minimal mutilation in pursuing the higher moral goals, it is reasonable to say that his principle will allow a democratic majority to enforce some taxes, including inheritance tax, which, as we saw in Chapter two, he embraces. In short, Nozick seems committed to saying that democratic societies are justified in violating the libertarian ethics of respect in order to enforce certain taxes. With Nozick's reaffirmation of the principle of minimal mutilation, he seems to give the state the moral license to interfere in people's legitimate holdings, though the interference should not involve a significant violation of rights. A further consequence is that 'minimal' taxation may be justified as necessary to pursue higher moral goals than respect for the libertarian rights. If the argument developed is a plausible one, then Nozick can no longer sustain his otherwise famous claim that taxation is theft and/or forced labor!

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[66] It is important to stress that it is the principle of minimal mutilation *plus* the permission for societies to enforce their democratic decisions that warrant violation of the rights of minorities. This is because the principle could be restricted to individuals. For example, I may be ethically allowed to snatch a dog away from a cruel master, though not to kill the master, even if Nozickean rights are silent about such matters and don't allow democratic enforcement of actions like mine. I owe this clarification and example to Wes Cooper.

Some detractors of Nozick have conceded that taxation "has some resemblance to forced labour"; however, they have insisted that "it is by no means as serious an infringement of liberty as forced labour" (Jonathan Wolff 1991: 92). In other words, they have sought to justify taxation on the grounds that the encroachment involved in taxation is not as grave as the infringement involved in forced labor. While I agree that taxation is justified, I think this argument misses the point of Nozick's objection. Nozick and libertarians are not hostile to taxation because of the 'minor' violation involved. Indeed, if the government of the USA forces billionaires such as Bill Gate and Oprah Winfrey to give up *only* a dollar each to help the poor—assuming they acquired their holding legitimately—libertarians would still vehemently dismiss the government's action as totally unacceptable. What makes the government's action unjustified, from the libertarian standpoint, is not the amount of money being taxed; rather it is the *coercion* involved that makes it unacceptable. Libertarians reject all forms of coercion; therefore, they would insist that being forced to give up a dollar is just as wrong as being forced to give up thousands of dollars. That is, they would say that "minor" right violation is still right violation![67] Thus, in my view, egalitarians unwittingly hand libertarians their victory by conceding that taxation, unlike forced labor, is a "minor" violation on people's self-ownership. Indeed, libertarians could dismiss the claim that taxation is a minor violation as empirically false, since the rich are forcibly taxed more than a dollar. More seriously, the fact that *even* defenders of taxation, including Wolff, will condemn a mugger who coercively demanded only a "dollar" at gun point as morally unacceptable seems to suggest that they cannot consistently reject the libertarian argument against taxation on the grounds of the amount of money being taxed.[68]

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[67] That said, elsewhere Nozick seems to hold that minor inconveniences may justify violation of rights. For example, when Nozick insists that one can save 10,000 animals from excruciating suffering by inflicting some slight discomfort on a person who did not cause the animals' suffering, (ASU: 41) he is obviously justifying the occasional inflicting of minor inconveniences.

[68] Some defenders of taxation have contended that the state does not really steal from citizens because it provides valuable services in return (Kearl, 1977: 74-81). While I think taxation does not amount to theft, this argument is implausible. To begin with, this argument implies that those who do not receive any

While the argument above does not succeed in undermining Nozick's ASU critique of taxation, I think the libertarian association of taxation with unjustified interference or theft lacks legitimacy, as it mistakenly characterizes labor as solely responsible for production. If, as I have tried mightily to demonstrate, neither labor nor natural resources alone can be sufficient for production, then taxation cannot be regarded as illegitimate interference or theft. In other words, since creating absolute property rights requires the use of resources, resources any single mortal person lacks the power to create, the libertarian cannot claim that taxation on ownership of external goods must involve interfering with a person's right to the exclusive use of his own labor. Thus, instead of viewing taxation and redistribution as theft, we should view it as a kind of compensation to those who are deprived of the natural resources since natural resources are the product of the community as well as the individuals. Individuals and the community, therefore, properly claim their share of resources through taxation, and hence taxation is not the taking away of property which licitly belongs to people. Since this kind of taxation is not a case of snatching from the people the benefits they themselves *exclusively* produce, Nozick is not entitled to say that it is theft or forced labor or robbery. Since natural resources alone cannot bring about production, a person who labors on resources should be rewarded with a *qualified* right to property; and having a qualified right does not entail being subject to unjustified interference.

Nozick's claim that taxation is theft/forced labor would stick *only if* the property is entirely one owner's. As long as laboring is incapable of effecting property rights over land and other natural resources—since these are not produced— a person cannot claim *unconditional* right to property. Accordingly, if the state holds some taxation right over one's property, then it is not, by collecting the tax, confiscating what is rightfully one's own. Indeed, one might go further to say that since virtually all property rights have elements of nature, and these elements are jointly owned, in the Nozickean libertarian society, refusing to pay tax on resources which make production possible, should be considered theft! If X refuses to pay tax on resources and the state comes to take possession of the portion that belongs in the common pool, then it may look like X loses something that is his. But in fact X is not expropriated, but merely dispossessed. The state

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valuable services from the state but are forced to pay tax are justified in saying that the state really "steals" from them. In other words, those who do not want the services provided by the state cannot be forced to pay tax. Libertarians may justifiably ask this: Why should individual citizens' hard-earned dollars be taken away from them involuntarily if they do not want the services provided by the state? Also, the fact that arm robbers who use what they steal from people for benevolent purposes are still legally and morally held culpable suggests that we cannot justify taxation on the grounds of the services provided by the state.

is merely bringing possession in line with property rights, as the libertarian believes should be done. If the state is "interfering" here, it is only in the way that it would "interfere" with a thief to return stolen goods to their rightful owner. To characterize this as an unjustified "interference" is to conflate property with possession or holding: The fact that one possesses a good does not imply that one has acquired the rights of ownership in it. This is because the term 'possession' is normatively *neutral*: it refers to whatever one has in one's possession; it does not entail that one has a property rights to one's possession. This being the case, taxing a person on his or her possession is analogous to seizing a burglar's ill-gotten possession. A person has no legitimate grounds for complaint when the government taxes him or her for the taxation is on the person's possession rather than his/her property. In short, since this form of taxation does not involve violation of property right, it *should* be unobjectionable even on libertarian grounds.

Taxation and the "Mysteriousness" of the Common-Ownership Assumption

Some modern secular theorists have tried to resist this argument by contending that the universal-ownership construals of the starting state cannot be motivated without an appeal to quaint theological premises. Indeed, some of the so-called secularists have ridiculed Locke for couching his 'common-ownership' argument on theological terms. Narveson, for one, tries to make fun of Locke's common-ownership argument when he writes:

> *Everyone's* having a share is simply impossible… no one can have any reason for thinking that the creator, if there is one, would necessarily give nature to mankind in general, rather than some favored group—the "Chosen" people… we must reject theology for these purposes. Theology is not publicly provable from common sense and science" (Narveson 2002: 118).

In support of Narveson, Edward Feser satirically asks:

> Are we to suppose that … a group of *Homo sapiens* finally evolved on our planet, at which point the entire universe suddenly became our collective property? (Feser, 2005: 60, 2004: 82).

Both Feser and Narveson insist that since God has not given us any resources to be distributed, it is odd in the extreme to claim that resources are collectively owned. Thus, they imply that taxes on external resources are equally theft. While I admit that Locke sometimes appeals to theology, his claim that resources are given to mankind in common could be logically independent of the theological foundations with which he begins. This 'independence', as I aim to show, is something desirable as it makes Locke's argument intuitively acceptable to both theologians and secular theorists. Locke's assertion that the initial resources are given to mankind in common by God is meant to buttress the point that we should not be deprived of the chance to acquire property on the basis of our social status. Essentially, Locke utilizes his 'common-ownership' argument to buttress the point that *all* human beings have the right to own private property. I think one does not have to be a theologian in order to support this claim. In other words, without recourse to theological authority, one might still find the premises of his argument compelling.

Indeed, as we saw in Chapter 4, Nozick, though a secular supporter of the right to private property, *tacitly* agrees with Locke that since resources are jointly owned, others have moral claim on the natural resources.[69] As I argued in the previous chapter, to deny the initial common ownership premise is, I think, to affirm that some are naturally superior to others or some people are more privileged than others and this is inconsistent with the secular libertarian claim that there are no natural masters and no natural slaves.[70] In my opinion, it does not really matter whether one says that God or Leviathan or even Lucifer gives resources to mankind generally. What matters, I think, is the underlying principle: that we have equal claim on the natural resources. As long as we see the world's natural resources as a common property upon which all persons have some claim, I think it is irrelevant who the giver(s) of these resources is (are). In other words, a detachment of theology from Locke's argument cannot considerably destroy the plausibility of his argument. Thus, Libertarians cannot dismiss taxation on natural resources on the grounds of Locke's 'mysterious' theology. In short, a rejection of Locke's theology is not sufficient to absolve us of our obligation to pay taxes on resources.

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[69] Indeed, the so-called secular left-libertarians have acknowledged the plausibility of the doctrine of the common-ownership of natural resources. They have therefore tried to combine a commitment to self-ownership with an egalitarian distribution of external resources (e.g., Peter Vallentyne and Hillel Steiner, *Left Libertarianism and Its Critics*, 2000). Left libertarians accept the thesis of self-ownership but also insist on equal ownership of external resources. Particularly, Steiner's starting gate theory simply proposes an egalitarian redistribution of the initial external resources without tampering with people's self-ownership. According to Steiner, as long as the resources have been equalized, and as long as people do not use their talents to wrong others, any inequalities that follow are legitimate (Steiner 1977: 49). Thus, he implies that taxation is theft *after* individuals have been assigned their equal share of natural resources. However, despite the apparent attractiveness of Steiner's argument, his principle of equal share of natural resources seems far from practicable. His argument presupposes unrealistically that human beings are capable of distributing natural resources equally. The impracticability of his theory becomes evident if we consider, for example, a piece of land: How can one equitably distribute a piece of virgin land? Even if we are able to ensure the quantitative distribution of land, given that fertility of land is something not 'visible', qualitatively, we may not approximate equality. If one is asked to divide a piece of virgin agricultural land equally between two people, owing to the different fertility rate of the land, one will not be able to determine that an equal distribution has been achieved. If land were a homogeneous and commensurable commodity, and if all land were of uniform quality and desirability, equal distribution would be realizable, and Steiner's "starting-gate" theory of justice would be valid. Unfortunately, as we have seen, the incommensurability of resources renders his entire argument unrealistic. Consequently, his argument does not rule out taxation on the initial world's resources, as he would have us believe.

[70] As we saw in the preceding chapter, Locke invokes this doctrine of common-ownership to argue against Filmer and all those who strongly argue against natural or biological and moral equality of men. Filmer argues that all possessions are originally held to be in the gift of the king, and hence private property is ultimately dependent on the grace of the monarch. By contrast, Locke plausibly contends that we all have moral claim on the natural resources.

According to Feser (2004) and Narveson (2002), given the "mysteriousness" of the common-ownership premises, the burden should be on the opponent of universal ownership to say why it should be thought that everyone owns everything, instead of that everyone initially owns nothing. However, the pertinent question is this: Why should the burden of proof lie with the critics of the doctrine of "no-ownership"? To be sure, the universal ownership theorists could equally say that the reverse is true: the no-ownership thesis is more in need of justification than the universal-ownership theory. Should they say that—and nothing stops them from saying that—we would appear to have a stalemate of each side demanding justification from the opponent. Libertarians owe us an explanation why we should regard the no-ownership assumption, and not the universal-ownership, as the default assumption to make. Why should unlimited right to property merely be treated as a default position? Without additional arguments showing why libertarians' argument is "more" intuitively plausible than the arguments of their opponents, their argument can be said to be inadequate, at best. Their argument assumes that the "no-ownership" theory is incontestably correct rather than vindicates it. They need to do more than sheer assumption!

Indeed, one might cast doubt upon the intuitive "superiority" of the no-ownership assumption: In the no-ownership scenarios, each person is endowed with the power to create rights in herself—is this really less contentious than that each person should be vested with property rights from the start? Moreover, the no-ownership variants give each inhabitant of the state of nature the right of using what others may want or need, while the universal-ownership states give each equal say in determining the disposition of the resources that all might use. When phrased in these terms—in terms of "equal freedom" versus "equal voice"—it seems less likely that no-ownership can win by default. Given that it seems more puzzling or mysterious to say that a piece of land is ownerless than to say it is owned by all mankind, one might conclude that it is the no-ownership advocate who has the burden of proof! Until and unless they shoulder that burden of proof, we will stick to our initial claim that taxation on natural resources does not amount to theft, or robbery, or forced labor or unjustified interference.

Chapter 6

Applications and Implications of Nozick's Entitlement Theory

Introduction

In the preceding chapters, I contended that Nozick's political philosophy, as represented in *Anarchy, State and Utopia* and saluted in *Invariances*, is divided against itself: It is explicitly libertarian, but implicitly non-libertarian. In this final Chapter of my thesis, I will buttress my contention that despite Nozick's insistence to the contrary, and notwithstanding the fact that libertarianism is conventionally associated with Nozick's name, Nozick really contributes nothing substantial to the hard core 'minimalist' libertarian philosophy. Thus, the bulk of this chapter will be devoted to showing why non-libertarians should not be afraid of Robert Nozick. Before I do so, however, I would like to discuss the philosophical significance of ASU in the debate about contemporary political philosophy.

The Philosophical Significance of ASU

My trenchant criticism of Nozick's libertarian political philosophy in the previous chapters should not be construed as an attempt to denigrate the philosophical value of Nozick's *ASU*. Indeed, in my estimation, Nozick did political theory an enormous service with the publication of ASU. As we shall see shortly, Nozick's ASU has contributed tremendously to the enrichment of political philosophy, invigorating debate and helping Nozick's philosophical opponents to sharpen their arguments. This, by itself, I will maintain, is a monumental accomplishment, for which we should commend Nozick.

Throughout the middle decades of the twentieth century and under the influence of logical positivism and linguistic analysis, philosophy is said to have retreated from normative theorizing. Rawls's *Theory of Justice* (1971) is generally believed to have played a central role in reversing that unfortunate retreat (c/f Feser 2004: 2-3). That said, while Rawls is conventionally credited with single-handedly revitalizing political philosophy as an academic study in the English-speaking world, even the most ardent detractor of Nozick cannot sincerely dispute the fact that *Anarchy, State, and Utopia* (1974) strongly *reinforced* philosophy's return to normative theorizing. In short, ASU, in my opinion, should be seen as complementing Rawls' effort to revive the discipline of political philosophy within the analytic school. Thus, it is not out of place to say that ASU is one of the greatest classics of twentieth-century analytic political philosophy.

Until the publication of Nozick's ASU in 1974, Rawls' *Theory of Justice* (1971) dominated contemporary debates. While the views expounded in Rawls' book were not unanimously accepted, political philosophers had no viable alternative *theory* to Rawls'. This being the case, they customarily presented alternative views, as opposed to theories, as mere responses to Rawls' theory (C/f Kymilicka 2002: 10). Or, as Nozick rightly acknowledges, "political philosophers… must either work within Rawls' theory or explain why not" (ASU: 183). Not only does Nozick explain the "why not", but he, unlike others before him, goes further to offer us an alternative *theory*, namely, the libertarian entitlement theory. Consequently, one might say that, with the emergence of ASU, Rawls' *Theory of Justice* lost its dominance or monopoly, so to speak. Of course, I do not mean to imply that the coming-out of ASU rendered Rawls' *Theory of Justice* inconsequential or nugatory. My point is that ASU opened a new option for philosophers: Philosophers *now* have two competing theories of justice dominating the discussion within contemporary Anglo-American moral, social and political philosophy. In saying this, I am agreeing with Jonathan Wolff that "with Rawls Nozick continues to dominate political philosophy" (1991: 139). After ASU, Rawls and his fellow egalitarians have the added responsibility of explaining why Nozick's "new" theory should be rejected in favor of Rawls'. In other words, they are now 'forced' to explain why we should regard Rawls' theory of justice, and not Nozick's entitlement theory, as the 'default' theory to accept. In short, egalitarians cannot win by default. Indeed, in response to Nozick's ASU, some egalitarian philosophers have been forced to reconsider assumptions they had taken for granted. For example, as we saw in Chapter five, G.A. Cohen, one of Nozick's most perceptive detractors, has conceded that Nozick's doctrine of self-ownership is so inherently appealing that Marxist socialists—including himself— have no choice but to incorporate the doctrine into their system (1995: 101). Thus, since the publication of ASU, Nozick's egalitarian and socialist rivals have argued back and forth over how to make the doctrine of self-ownership cohere with the tenets of egalitarianism. We can therefore say that Nozick woke Marxist socialists, particularly Cohen, from their dogmatic slumbers. After reading Nozick's book, Cohen did not seem to get the plausibility of Nozick's libertarian doctrine of self-ownership out of his mind. As it were, Cohen's 'experience' was similar to what Kant had said after reading David Hume: it was "the very thing which many years ago first interrupted my dogmatic slumber."[1] In short, just as Hume awoke Kant from his dogmatic slumber, so did Nozick awake egalitarian political philosophers from their long time slumber.

Indeed, Nozick's ASU challenges philosophers in general and egalitarians in particular, not to assume without argument that justice demands extensive redistribution of wealth in the direction of equality. As Wolff puts it: "It is rare that a single work has managed to challenge so many received views" (Wolff 1991: 139). We can say, with considerable appropriateness, that Nozick has done political philosophy more good than harm by 'forcing' some philosophers to think critically and improve their theories, thereby strengthening their arguments and making them more convincing.

Furthermore, while it is generally agreed that Rawls rekindled political philosophy from its demise, Nozick, in my estimation, should be credited with the revival of interest in *the idea of natural rights* as being central to political theory. Even an ardent critic of Nozick cannot help but to admire his 'invisible hand explanation' of the state, with its emphasis on the importance of the rights of individuals. The basic idea of the invisible hand explanation, as we saw in Chapter 1, is to demonstrate that rational individuals in the state of nature, in trying to improve their position, will perform actions which will eventually bring about a minimal state, although no one intended it. Nozick's use of the invisible-hand methodology is designed to show why the minimal state would arise from the state of nature and

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[1] Immanuel Kant, *Prolegomena to Any future Metaphysics*, trans. Lewis White Beck (New York: Bobbs-Merrill, 1950), p. 8

could do so without encroaching upon anyone's rights. Thus, in my opinion, one of Nozick's original contributions to the debate about contemporary political philosophy is his utilization of the invisible-hand explanation to buttress the importance of individual rights.[2] To see further why Nozick really deserves to be credited with the revitalization of interest in the notion of natural/individual rights, let us delve a bit into history.

Beginning in the latter half of the eighteenth century and continuing through most of the twentieth century, natural right liberalism was usurped by a series of opposing political theories, including utilitarianism and other collectivist ideologies. Those opposing theories had one thing in common: they denigrated the concept of individual right. However, it can be said that since the publication of ASU, there has been a resurgence of interest in natural rights liberalism. To be sure, ASU begins with this powerfully ringing declaration: "Individuals have rights, and there are things no person or group may do to them (without violating their rights") (ASU: p. ix). And as we saw in Chapter three, Nozick's entire libertarianism is built upon the foundation of the theory of individual rights. Thus, there is an element of truth in Richard Tuck's claim that "with the exception of Robert Nozick, no major theorist in the Anglo-Saxaon world for almost a century has based his work on the concept of right" (Tuck 1979: 1).

Given this fact, it is not surprising that Nozick's ASU continues to play a critical role in any analysis of the notion of rights. To be sure, it has become virtually impossible to address any study of rights without addressing or referencing the work of Nozick and ASU. Given the indispensable role Nozick's ASU plays in political philosophy in general, and the concept of rights in particular, one cannot help but to agree with Peter Singer that it is unfair to say that "When times are hard and governments are looking for ways to reduce expenditure, a book like *Anarchy, State, and Utopia* is about the last thing we need" (Singer in Paul 1981: 38). Of course, reading ASU may not alleviate one's economic plight. Nor may it 'convert' one into libertarianism. However, it will certainly 'force' one to working out why one is not a libertarian. In a word, Nozick's book can toughen the mind and help one to develop intellectual muscles.

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[2] While I am here confining my discussion to the philosophical significance of ASU, I cannot resist the temptation to mention his 'evolutionary' accounts of rights in *Invariances*. Without a doubt, Nozick's evolutionary explanation of mutually beneficial cooperation leading to recognition of the Ethic of Respect demands our respect and admiration.

In sum, I believe Nozick's project has served in a positive way by forcing philosophers to assess and modify their own views to accommodate his objections. The lesson that we have to learn from Nozick's project is that, as philosophers, we should try as much as we can to shun dogmatism by challenging philosophical "sacred" or conventional views. His project should be deemed more philosophically important since, philosophy, I would like to believe, unquestionably thrives on challenge, reflection and argumentation. Although ASU is not perfect (and which book is!), I believe, its imperfections pale before its philosophical virtues.

Nozick's Benign Libertarianism: Why Non-libertarians shouldn't be Afraid of Nozick

Given the philosophical value of Nozick's ASU, as elucidated above, it is not absurd to say that the book should be welcomed by philosophers in general, and political theorists specifically, regardless of what one may think of its conclusions. However, there are some philosophers who see Nozick's book with a disparagement. As we saw in Chapter three, some detractors of Nozick insist that the conclusions of ASU are so uncongenial and callous that they should not be taken seriously as political philosophy at all (Cohen 1995: 31, Scheffler 1982: 167, Hodson 1977: 225). Others have gone as far as to assert that Nozick's Entitlement Theory is so patently cruel that it warrants no philosophical scrutiny (Mark Fowler 1991: 255, Nielsen 1985: 250). In short, these non-libertarian commentators have dismissed Nozick as an ideological aberration.

It should be clear by now that I do not share the above negative assessment of Nozick's book, notwithstanding my criticisms of him. Contrary to what the above-named commentators think, I have contended that even Nozick of ASU is not insensitive to the poor, as critics and Nozick himself would have us believe. Indeed, I have argued that Nozick's libertarianism itself is suffused with welfare redistributivism. If the argument developed in this thesis is correct, then egalitarian detractors have no justifiable reason to be intimidated by Nozick. *Even if* my arguments in the preceding chapters are not convincing enough to "placate" Nozick's philosophical opponents, I maintain that Nozick's libertarianism in ASU is 'harmless' in a world fraught with fraud and other past injustices. The remainder of this thesis will be devoted to defending this claim.

To start with, those who dismiss Nozick's theory as insensitive to the plight of the poor can take solace in the fact that Nozick's defense of the entitlement theory is a philosophical argument. In other words, his entitlement theory, as I aim to show, is not intended to be applied to the real *imperfect* world.[3] I am inclined to concur with Peter Singer that "the book [ASU] will probably do more good in raising the level of philosophical discussion than it will do harm in practical politics" (Singer in Paul: 1981: 37). Simply put, it can be said that Nozick's theory has no real practical implications or effects.

To defend the claim that Nozick's entitlement theory has no practical adverse effects in practical politics, let us briefly revisit the three principles that the Entitlement theory is composed of: the first one is the principle of *Acquisition*. This principle refers to how people can acquire rights to properties of various sorts. The second principle, the principle of *Transfer*, stipulates the conditions under which rights to certain properties can be transferred from one person to another. As we saw in Chapter one, in an *ideal* world, these two principles would be the only principles of justice that we would need to determine whether a certain distribution of goods is just. However, in reality, as Nozick rightly concedes, there is force and fraud, and thus the world is far from being just. Accordingly, in our non-ideal world, a world where past injustices abound, we will need a third principle of justice. Nozick calls this third principle the Principle of *Rectification*. The principle of rectification seeks to show how to rectify injustices when property is illegitimately acquired or transferred (ASU:

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[3] That said, it should be mentioned that Nozick is quite ambivalent on this. That is, he does not appear to speak with a single voice: sometimes he seems to employ his entitlement theory to criticize our modern democratic states. Indeed, Chapter 9 of ASU is devoted to arguing against actual contemporary states. However, as we shall see shortly, Nozick himself openly concedes that his entitlement theory of justice has no application to any society where the existing distribution of assets might reflect historical injustices.

230). To reinforce my claim that Nozick's libertarianism is benign, I will focus exclusively on the third principle, namely, the principle of rectification.[4]

According to the principle of rectification, victims of past injustice should be sufficiently compensated if they are no worse off—having received compensation—than they would have been had the injustice not taken place. This compensation requirement of the principle of rectification is what Gregory Kavka (1982) calls the 'No Net Harm Criterion'. One might say that the principle of rectification is an important component of Nozick's theory because, as we shall see shortly, *if* the past injustices have shaped present holdings, then Nozick's entitlement theory cannot be invoked to repudiate current redistribution. On the other hand, if present holdings are devoid of historical injustices, then libertarians will be justified in invoking Nozick's theory to condemn current liberal economic distributions. This reading of Nozick is textually well grounded:

> In the absence of [a full treatment of the principle of rectification] applied to a particular society, one *cannot* use the analysis and theory presented here to condemn any particular scheme of transfer payments, unless it is clear that no considerations of rectification of injustice could apply to justify it (ASU: 231).

In order to determine whether or not Nozick's theory can be applied to a particular society, we need to ask this question: "Have the past injustices shaped current holdings?" Nozick's answer to the above question is a resounding 'yes': "Some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges." (ASU: 152). Nozick's affirmation of the existence of past injustices is not unexpected, given that human history is not one of just initial aqcuisition nor just transfers: It is a history of slavery, conquest, theft and fraud (c/f Farrelly 2003).

Given the obvious fact that human history is a history of unending injustices, the principle of rectification requires that we remedy those injustices. However, while the successful application of the principle of rectification is indispensable to the theoretical viability of the Entitlement Theory in general, there are some factors which seem to impede its successful implementation. For example, it is not at all easy to identify the victims and perpetrators of an illegitimate acquisition or transfer and/or their descendants. Given our limited knowledge, it is practically impossible to identify all of the victims. The problem is compounded by the fact that it is virtually impossible to know who the real legitimate owners are. Even if we could magically identify the perpetrators and their victims, there would be a question of the extent of the wrong committed, and the necessary reparation. As Jonathan Wolff elucidates, "Stephen Dedalus in Joyce's Portrait of the Artist as a Young Man asks whether, if a man steals a pound and makes a fortune, he must pay back that pound, or the entire fortune. Nozick must find an answer" (Wolff 1991: 115).

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[4] For a detailed discussion of the first two principles, see chapter one.

Worse still, it is extremely difficult, if not impossible, to tell how far back to go in wiping clean the historical slate of injustices. Since Nozick of ASU insists that property rights are virtually inviolable, he is committed to saying that we must go all the way back. However, given the fact that human beings are not omniscient, going all the way back will deprive us of obtaining reliable information regarding the victims and perpetrators of injustice. Nozick, to his credit, candidly acknowledges that the principle of rectification raises numerous intractable questions for his entitlement theory:

> How far back must one go in wiping clean the historical slate of injustices? What may victims of injustice permissibly do in order to rectify the injustices being done to them, including the many injustices done by persons acting through their government? I do not know of a thorough or theoretically sophisticated treatment of such issues. Idealizing greatly, let us suppose theoretical investigation will produce a principle of rectification. This principle uses historical information about previous situations and injustices done in them... and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred... if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized (ASU: 152-153).

Given that Nozick is not omniscient, his admission that he does "not know of a thorough or theoretically sophisticated treatment of such issues" is understandable. However, if his theory is incapable of handling the admittedly intractable questions raised by the rectification principle, then the viability of his entire entitlement theory becomes questionable.[5] Since past injustices have been committed, to give credibility to his theory, the effects of all illegitimate acquisition should be rectified, and the resources restored to their bona fide owners. In sum, the entitlement theory must invoke the principle of rectification in order for his entire theory to be credible. Thus, while we may appreciate Nozick's admission of the difficulty of implementing the entitlement theory, his admission is deeply troubling. It is troubling because, as Lawrence Davis has observed, the principle of rectification is "an essential part [of the Entitlement Theory]; for, without it, owing to the inductive nature of the definition of entitlement, if there has been a single injustice in the history of the state, no matter how far back, the state will not be able to achieve a just distribution of goods in the present" (Davis 1982: 348). Nozick's admission discloses a major weakness of his libertarianism in general, and the Entitlement Theory in particular. For it is clear that this *could* mean many holdings we now take to be just are not. If a present holding can be traced back to conquest or by force or fraud, then, that holding will not be just; its owner(s) will not be entitled to it. David Lyons (1982) takes such speculations further and asks if this may not mean much of the U.S. rightfully belongs to the American Indians and so should be returned to them. In a word, the Entitlement Theory seems to sanction reshuffling and redistribution of current resources!

In Nozick's defense, one might say that since not all present-day holdings are tainted by past injustices, his entitlement theory cannot be invoked to justify massive redistribution. The problem with this line of reasoning is that it unrealistically implies that we are capable of separating illicit past holdings from legitimate ones. Indeed, since Nozick admits that it is impossible to identify all past injustices (ASU: 152) that have shaped current holdings, this line of reasoning is not available to him.

The consequences of applying Nozick's principle of rectification may be more far-reaching than supporters of Nozick's libertarianism seem to realize. Individuals and groups of people who have suffered past injustices can invoke Nozick's principle to argue for wholesale redistribution. For example, descendants of Black/African-American slaves can invoke the principle of rectification to defend welfare distribution. That is, they could utilize Nozick's theory to call for compensation in a form of redistribution of resources for the apparent sufferings of slaves and its subsequent discrimination. Similarly, governments of developing countries may invoke the principle to argue for 'global distribution' given that some developed countries have openly acknowledged some injustices committed against developing countries. In short, the principle of rectification arguably commits libertarians to endorsing redistribution through welfare programs at both national and global levels. To be sure, the intractable difficulties of implementing the entitlement theory in actual societies have forced Nozick to come perilously close to recanting his earlier argument against welfare states and redistributivism:

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[5] In opposition to my argument, one might ask this: "Why is the burden of proof on Nozick rather than the one who appeals to the principle of rectification without credible evidence?" The quick and simple answer to this question is that since Nozick himself explicitly admits that it is impossible to seek credible evidence, shifting the burden of proof on those who appeal to the principle (by asking them to seek credible evidence) is tantamount to asking them to do the impossible. Indeed, as we shall see shortly, Nozick, to his credit, admonishes against invoking his principle to evaluate the present-day distribution of resources precisely because of his fervent conviction that 'historical credible evidence' is not attainable.

> These issues are very complex and are best left to a full treatment of the principle of rectification. In the absence of [a full treatment of the principle of rectification] applied to a particular society, one *cannot* use the analysis and theory presented here to condemn any particular scheme of transfer payments, unless it is clear that no considerations of rectification of injustice could apply to justify it. Although to introduce socialism as the punishment for our sins would be to go too far, past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them (ASU: 231).

Indeed, Nozick goes as far as to advocate one of the 'patterned' principles of distributive justice as the best way to resolve the issue of rectification. More specifically, Nozick explicitly adopts Rawls' Difference Principle—a principle he vehemently repudiated earlier as an end-result principle— as a remedy to past injustices. Given a long period of injustice, and given the obvious absence of detailed and reliable historical information, Nozick now concedes that it may be appropriate to introduce as a rough rule of thumb something like this: "Organize society so as to maximize the position of whatever group ends up least well off in the society" (ibid. 231). Arguably, one might say that Nozick's theory of justice in rectification bears a striking resemblance to Rawls' Difference Principle: both seem to mandate redistribution of current holdings!

Some defenders of property rights have tried to avoid this apparently embarrassing redistributive implication of Nozick's principle of rectification by avoiding looking into the historical origins of their property. Blackstone, for example, writes: "There are very few that will give themselves the trouble to consider the origin and foundation of this [property] right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title."[6] Others have gone as far as to contend that as long as the current distribution promotes people's freedom and fulfils their current needs, we are justified in ignoring any 'original sin'[7] or historical injustices (John Sanders 1987). Consequently, Sanders insists that since what matters is the end-result, as opposed to the historic origin, defenders of property right should adopt 'amnesia about history', to use Kymlicka's phrase (2002: 112).

Without a doubt, Blackstone's and Sanders' argument would constitute a powerful argument in favor of end-state theorists. For example, utilitarians—such as J. S. Mill—who define their liberalism in terms of maximization of liberty or freedom would be happy to take on board Sanders' argument. However, consistency debars Nozick from invoking Sanders' 'end-result' theory to defend his libertarian political philosophy. As we saw in Chapter one, the entitlement theory, according to Nozick, is purely historical in the sense that it makes the justice of a given set of holdings depend *exclusively* on the *history* of those holdings. At the core of Nozick's entitlement theory is the claim that the history of the distribution must *always* be examined before one can say whether a distribution is just or unjust. It is not for 'nothing' that Nozick calls his theory a 'historical' conception of justice (ASU: 153-4). It should also be remembered that Nozick dismisses the end-state conceptions of justice as incompatible with individual right or liberty precisely because the end-state theorists 'ignore' the history of peoples' acquisition. Consequently, if Nozick joins Sanders in arguing that justice is a matter of the 'end-result', he will have a hard time distinguishing his position from the position of end-result' theorists", such as Rawls.

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[6] Blackstone, *Commentaries on the Law of England*, book 2. Quoted in Kymlicka 2002: 112.

[7] I owe this phrase to Kymlicka (2002).

Since Nozick rightly maintains that past injustices have not been rectified and goes on to overtly advocate Rawls' difference principle, it is not unfair to stick to our claim that his entitlement theory does not rule our redistribution through taxation and welfare programs. Nozick's concession to Rawls' Difference Principle is also a concession that there are some illegitimate current entitlements. This clearly implies that many property rights held today can trace their lineage back to forceful and illicit appropriations; therefore, redistribution via taxation and welfare programs should be unobjectionable even on Nozickean grounds. Thus, we can fairly say that Nozick eventually joins Rawls in defending redistribution and welfare programs at least as far as our imperfect world is concerned.

Nozick has tacitly tried to distinguish his theory from Rawls' by insisting that the difference principle will only be necessary in a 'short run'. He seems to hold that his use of the difference principle would be a one-shot affair; therefore, the DP would become 'defunct' after all historical injustices have been rectified. While in the abstract, this line of defense sounds plausible, it underrates the gravity of past injustices. It should be pointed out that since Nozick concedes that he does not have the answer to how far back one must go in wiping clean the historical slate of injustice, he cannot be absolutely certain that Rawls' difference principle will be needed only in the 'short run'. Indeed, one might contend, with plausibility, that the number of injustices perpetrated throughout history, both within nations and between them, is so colossal that it is extremely unlikely that such injustices could be remedied in the short run. Considering the extent of historical injustices, one might go further to say that it would take more than one generation to rectify all the past injustices (C/f Farrelly 2003). In sum, given the enormity of past 'sins', and given Nozick's own admission that his theory is not 'practicable' to remedy those 'sins', it is not absurd to conclude that he will need Rawls' 'practical' difference principle for a good number of years, if not forever, to deal with current 'actual' injustices.

I realize that the 'impracticability' of Nozick's theory might not perturb him. For while he admits that how a theory gets applied 'in practice' is important, he believes it is not the whole story.[8] As he puts it: "the actual situation count at least for half… it is not the whole of it…it is inspiring to have an admirable ideal, even when we are falling short of it" (Nozick 1989: 282). Nozick's point, if I understand him correctly, seems to be that some ideals are intrinsically valuable even if they are 'impracticable'. If this reading of Nozick is right, then, presumably, Nozick would respond to my criticism above by saying that although his entitlement theory is not 'practicable', it is nevertheless *ideally* useful. Indeed, Nozick draws a contrast between the ideal and the actual, stressing that the former need not be actualized in order to be admirable or acceptable (See Nozick 1989: 279-285). With his actual/ideal distinction, Nozick might further contend that the ideal is a libertarian society in which the past is devoid of any injustice, or if there were injustices, those injustices have been fully 'purified'. The actual, on the other hand, is our 'welfarist and distributivist' society in which there are palpably historical injustices, injustices that have *not* been rectified.

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[8] Wes Cooper pointed this out to me, in comments on an earlier draft.

While I agree with Nozick that the 'idealistic' and 'unrealizable' nature of his Entitlement Theory doesn't render the theory useless, libertarians who think of their political philosophy as essentially 'practical' would not be happy with his ideal/actual distinction. To begin with, Nozick's actual/ideal distinction buttresses my dominant contention that 'practical' libertarians cannot rely on Nozick's 'idealistic' entitlement theory to defend their practical programs. By contrast, welfare liberals would happily endorse his "ideal/actual" argument, since his argument clearly presupposes that the entitlement theory cannot be invoked to repudiate 'actual' liberal 'welfarist' states. In a nutshell, while I think Nozick's ideal/actual distinction adds coherence and plausibility to his libertarian theory, the distinction commits libertarians who endorse Nozick's entitlement theory to recanting their argument against "practical" welfare states.

To sum up, as long as Nozick acknowledges that past injustices have contaminated the legitimacy of present holdings (ASU: 152) and as long as he goes on to concede that those past injustices have not been rectified, his entitlement theory cannot be invoked to inveigh against redistributive taxation in the current, non-ideal setting.[9] As we have seen, Nozick states in no uncertain terms that his historical entitlement theory is not germane in evaluating the justice of actual societies until his principle of rectification has been successfully implemented. We can then say that until and unless past injustices are completely rectified, Nozick cannot sincerely argue that taxation is theft, since taxation might be the best way to resolve the issue of rectification. Thus, Nozick cannot invoke his historical entitlement theory to legitimize his minimal state. Indeed, the historical entitlement theory, when applied to non-ideal societies, will rather instigate an egalitarian redistributive state. Considering the number of injustices that have taken place in human history, contemporary governments can resort to Nozick's entitlement theory to justify a number of egalitarian measures. Libertarians who continue to employ Nozick's entitlement theory to condemn the existing redistribution through welfare programs need to be reminded, once again, of Nozick's stern admonition: "One cannot use the analysis and theory presented here [in ASU] to condemn any particular scheme of transfer payments" (ASU: 231). Consequently, political libertarians who oppose tax-financed social welfare programs cannot use Nozick's ASU as an apologia.

Recapitulation

Let us briefly review what has been accomplished. My aim has been to show that Nozick's libertarian position, as defended in ASU and recently saluted in *Invariances* and the interview near the end of his untimely death, unwittingly justifies a form of patterned theory which sits uncomfortably with his apparent repudiation of redistribution through taxation and welfare programs. While my thesis essentially focused on ASU, I discussed some major ideas that Nozick developed especially in Post-ASU — about democracy, personal identity, the four-level structure, and the core of ethics — with an eye to demonstrating that what seems to be an *explicit* endorsement of patterned theories and redistributive taxation in some of his later writings is rather made *implicit* in ASU and *Invariances*.

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[9] I realize Nozick might remind me that apparently redistributive taxation that has a rectificationist rationale isn't *really* redistributive. However, if this is the case, then practical libertarians cannot dismiss the current welfare states as unjustifiably 'retributivist', since, as I have argued, redistributive taxation could be viewed as a kind of 'rectification' or compensation.

Furthermore, in opposition to some egalitarian detractors who dismiss Nozick's theory as philosophically 'valueless' on the grounds of its 'callousness', I argued that we do not have to see Nozick's theory as a threat to a *real* society, since his theory is not applicable to any existing society. Nozick himself, as I pointed out, concedes that his theory of justice would be appropriate if the world were wholly just. But since he also acknowledges that the world is full of injustices and hence, something like Rawls' Difference Principle is needed as a mechanism to deal with the current injustices, he would have no valid grounds to jettison redistribution and welfare institutions. Indeed, I maintained that Nozick's theory does not possess the resources to evaluate the current distribution of resources. In short, since his theory applies to governments in ideal states, contemporary non-ideal welfare states are immune from Nozick's ASU critique of welfare states. Indeed, welfarism, *in the sense of rectification,* is not incompatible with Nozick's entitlement theory.

If the argument developed in this thesis is correct, then welfare liberals should find Nozick much more congenial than they imagined possible. To buttress this point, I argued that even in ASU, where his libertarianism is said to entail absolutism or inviolability of rights, (Hailwood 1996: 10) he wavers considerably in his conviction that one's legitimate property is to be left alone save with one's permission. Indeed, contrary to what some commentators think, I divulged that the misfortunes of others seem to matter dearly to Nozick. The water hole episode that we discussed in Chapter four revealed that Nozick's theory of property is not insensitive to the plight of the poor. His water hole example, I argued, commits him to saying that we must help people who are victims of circumstances beyond their control. This suggests that many people in contemporary 'suffering-infected' societies would "qualify" to be covered by what I called Nozick's doctrine of 'catastrophic moral horror'. Nozick does not indicate how much one should suffer in order to be accommodated by the catastrophic moral horror. But if he insinuates that thirst is so catastrophic that everyone should have access to people's *legitimate* water hole, then to remain consistent, he must acknowledge that millions of people who are suffering from hunger catastrophes owing to natural disasters like prolonged drought, earthquake, tsunami, and hurricanes have the right to other people's legitimate holdings.

However, while his doctrine of catastrophic moral horror is intuitively plausible, I maintained that the doctrine radically deviates from the libertarian inviolable status of property rights. Nozick, I argued, cannot successfully minimize this deviation since the violation of rights necessitated by the moral tragedy is not the only exception. To be sure, as I contended, the doctrine of catastrophic moral horror is consistent with Nozick's treatment of bequests in *The Examined Life*: the fortunate water hole owner, if allowed to charge whatever price he deems fit, would end up being extremely rich, while those who have lost their water hole would end up being extremely poor. Accordingly, restricting the right of the fortunate water hole owner is morally justified by Nozick's inheritance law or tax. As well, I pointed out that the doctrine of the catastrophic moral horror sits well with Nozick's four-layer moral structure and its principle of minimum mutilation. Nozick's principle of minimum mutilation—a principle he hangs on to in his *Invariances*— presupposes that rights can be justifiably but minimally violated in order to attain a higher moral goal. Thus, his principle would justify restriction of the right of the water hole owner since the gain in ethical responsiveness would outweigh the cost of the ethic of respect.

Even in ASU, where he insists that only negative rights (or the 'ethic of respect' as he called it in his *Invariances*) can be coercively enforced by the State, I argued that his endorsement of the Lockean Proviso commits him to Locke's doctrine of the *original* communism: the doctrine that mankind originally had collective entitlement to all natural resources. With his commitment to the doctrine of original communism, redistributive taxation might be viewed as a kind of compensation to those who are deprived of the natural resources, since natural resources are the product of the community as well as the individuals. Individuals and the community, therefore, properly claim their share of resources through taxation and welfare programs.

If my analysis is correct, then we might say that there is a *prima facie* case that major ideas and theories that Nozick defend in ASU and *Invariances*, including the Lockean Proviso, the principle of rectification, the doctrine of the 'catastrophic moral horror', the four-level moral structure, and the core of ethics lead away from the libertarian political philosophy. If that case stands, then welfare liberals, including Rawls, should not be intimidated or dismayed by Nozick's anti-redistributivist emphasis in ASU. Rather, welfare liberals should regard Nozick as a theoretical ally, since Nozick's libertarianism comes perilously close to transmogrifying into the 'welfare state'— a Nozickean nightmare! And when his theoretical shifts in his Post-ASU, notably the *Theory of Rationality*, *The Examined Life*, and *Philosophical Explanations* are taken into account, we can arguably conclude that Nozick has been a consistent non-libertarian all the way through in his oeuvre, notwithstanding his recent protestations of fidelity to libertarianism.

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